U.S. Customs and Border Protection

Slip Op. 10–36

PASTA ZARA SPA, Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, AND NEW WORLD PASTA COMPANY, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 09–00001

[Affirming in part and remanding in part the final results of the eleventh administrative review of an antidumping duty order on certain pasta from Italy]

Dated: April 7, 2010

Law Offices of David L. Simon (*David L. Simon*) for plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Carrie A. Dunsmore* and *Jane C. Dempsey*); *Daniel J. Calhoun* and *Mykhaylo Gryzlov*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Kelley Drye & Warren LLP (*David C. Smith, Jr.* and *Paul C. Rosenthal*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiff Pasta Zara SpA ("Zara SpA" or "Zara"), an Italian producer and exporter of pasta products, contests the final determination ("Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), issued to conclude the eleventh administrative review of an antidumping duty order on certain pasta from Italy (the "subject merchandise"). *Certain Pasta From Italy: Notice of Final Results of the Eleventh Admin. Review & Partial Rescission of Review*, 73 Fed. Reg. 75,400, 75,400 (Dec. 11, 2008) ("*Final Results*"). Zara SpA advances three claims. It claims, first, that Commerce erred in deeming Zara SpA's sales of subject merchandise to be constructed export price ("CEP") sales rather than export price ("EP") sales. Compl. ¶¶ 10–13. Second, plaintiff contests Commerce's classifying certain accounting expenses incurred by Zara's U.S. affiliate as direct expenses rather

than indirect expenses. *Id.* ¶¶ 14–18. Finally, Zara challenges Commerce's finding that Zara's sales in its home market of Italy occurred at a single level of trade ("LOT"), when, according to Zara, the record evidence establishes that some of these sales occurred at a second, more remote level of trade. *Id.* ¶¶ 19–23. Zara claims that Commerce erred in failing to exclude these sales from the calculation of normal value. *Id.* Based on an examination of the record evidence supporting Commerce's findings, the court affirms Commerce's decision to classify Zara's U.S. sales as CEP sales. Because the Final Results do not address the objection underlying plaintiff's second claim and because defendant agrees that a remand is appropriate on this claim, the court's order directs Commerce to reconsider its decision to treat the accounting expenses as indirect expenses. On plaintiff's third claim, the court, concluding that Commerce did not give adequate consideration to the relevant record evidence, orders Commerce to reconsider its determination that Zara's home market sales occurred at a single level of trade.

II. Background

Commerce initiated the eleventh review of an antidumping duty order on certain pasta from Italy on August 24, 2007. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Request for Revocation in Part*, 72 Fed. Reg. 48,613, 48,614 (Aug. 24, 2007). Commerce published preliminary results of the eleventh review on August 6, 2008, in which it determined for Zara SpA a preliminary weighted-average dumping margin of 10.34%. *Certain Pasta from Italy: Notice of Prelim. Results of Eleventh Antidumping Duty Admin. Review*, 73 Fed. Reg. 45,716, 45,720 (Aug. 6, 2008) ("*Prelim. Results* "). In the *Final Results*, Commerce assigned Zara a margin of 9.71%. *Final Results*, 73 Fed. Reg. at 75,401. The Final Results incorporate by reference a memorandum ("Decision Memorandum") containing a discussion of the Department's findings and conclusions. *Id.*; *Issues & Decisions for the Final Results of the Eleventh Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy (2006-2007)* (Dec. 4, 2008) ("*Decision Mem.* ").

Plaintiff brought this action on January 5, 2009. Summons; Compl. Before the court is plaintiff's motion for judgment upon the agency record. Mot. of Pl. Pasta Zara SpA for J. upon the Agency R. pursuant to Rule 56.2 ("Pl. Mot."); Principal Br. of Pl. Pasta Zara SpA for J. upon the Agency R. pursuant to Rule 56.2 ("Pl. Br."). Defendant opposes Zara's motion with respect to the first and third claims in the complaint but acknowledges that a court remand is appropriate on the second claim, agreeing "that Commerce did not adequately con-

sider Zara's contention" that certain "accounting expenses should be treated as indirect selling expenses, because they were not related to specific sales but were incurred regardless of the number of sales made in any given time period." Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. 18 ("Def. Resp."). Defendant-intervenors oppose Zara's motion with respect to all three of plaintiff's claims. Def.-Intervenors' Br. in Resp. to Pasta Zara's Mot. for J. on the Agency R. ("Def.-Intervenors Resp.").

III. Discussion

The court exercises jurisdiction according to 28 U.S.C. § 1581(c) (2006). In ruling on Zara's motion for judgment upon the agency record, the court must hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

A. The Court Must Sustain Commerce's Determination that Zara's Sales of Subject Merchandise Were Constructed Export Price Sales

Zara SpA contests as unsupported by substantial record evidence Commerce's determination that its sales of subject merchandise were constructed export price sales as defined by 19 U.S.C. § 1677a(b) rather than export price sales as defined by § 1677a(a). Compl. ¶¶ 10–13; 19 U.S.C. § 1677a(a)-(b) (2006). Based on the administrative record, the court must sustain Commerce's determination.

> According to the statutory definition, export price is
>
> the price at which the subject merchandise is first sold (or agreed to be sold) *before the date of importation* by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

19 U.S.C. § 1677a(a) (emphasis added). A constructed export price sale, in contrast, may occur either before or after the date of importation. *Id.* § 1677a(b). A constructed export price sale is a sale that is made in the United States by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser unaffiliated with the producer or exporter. *Id.*

It is undisputed that a U.S. affiliate of Zara, Pasta Zara-USA Inc. ("Zara-USA"), Compl. ¶ 15, performed a role related to the sale of the subject merchandise in the United States that included invoicing the U.S. unaffiliated customer for the merchandise. Pl. Br. 6–8. The parties dispute the significance of that role and of the invoices. *See id.* 8–18; Def. Resp. 8–12; Def.-Intervenors Resp. 4–21. Partly as a result of that dispute, they disagree on the issue of whether the sales of Zara's subject merchandise qualified as export price sales.

Plaintiff argues that the course of dealing between Zara SpA, Zara-USA, and the single unaffiliated U.S. purchaser demonstrates that arm's-length sales, or agreements to sell, between Zara SpA and the unaffiliated purchaser occurred outside of the United States prior to the date of importation. Pl. Br. 6–9. In plaintiff's view, "the mutual assent to the price and quantity terms clearly occurs between Zara SpA and the arm's-length customer long before the goods are shipped from Italy." *Id.* at 9. Plaintiff contends that a binding agreement to sell the subject merchandise is formed "when the customer issues its purchase order and Zara [SpA] relies on the purchase order to begin production." *Id.* at 3. Although admitting that Zara SpA did not provide the unaffiliated customer a written acknowledgment of its acceptance of the purchase order, plaintiff argues that "[t]he mutual assent is evident in Zara's production against the customer's purchase order, which specifies both price and quantity" and that "Italy is therefore the 'location of the sale' and Zara SpA is therefore the seller; no subsequent actions can change these facts." *Id.* at 9. Plaintiff cites the United Nations Convention on Contracts for the International Sale of Goods, arts. 14, 18, *opened for signature* Apr. 11, 1980, S. Treaty Doc. 98–9, at 25 (1983), 19 I.L.M. 671, 674–75 ("CISG" or the "UN Convention"), for the proposition that this production against the purchase orders created binding agreements to sell. *Id.* at 9, 17. It relies on *Corus Staal BV v. United States*, 502 F.3d 1370, 1376 (Fed. Cir. 2007), and *AK Steel v. United States*, 226 F.3d 1361, 1374 (Fed. Cir. 2000), to support its argument that these sales, as agreed upon in Italy, are EP sales according to the statute. *Id.* at 8–9, 17. Plaintiff also cites several antidumping determinations from administrative reviews of other subject merchandise, *id.* at 9–12, to support its contention that, an agreement to sell already having been established, no meaningful activities occurred in the United States.

In reviewing the Department's factual determinations according to the substantial evidence standard, the court examines the evidence on the record considered as a whole. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (holding that the court may affirm a determination as sup-

ported by substantial record evidence even if some evidence detracts from the Department's conclusion). The record as a whole contains some evidence to support plaintiff's "course of dealing" argument. For example, Zara SpA provided in its questionnaire response documentation for an example of one of its sales, including an invoice that plaintiff describes as "the export invoice, showing the customer as Zara-USA and the destination as the unaffiliated customer." *Pasta Zara SpA Questionnaire Resp.* 14 (Dec. 12, 2007) (Confidential Appendix of Pl. Pasta Zara SpA to Principal Br. of Pl. Pasta Zara SpA for J. upon the Agency R., Ex. 3) ("*Questionnaire Resp.* "). The questionnaire response refers to a second invoice as "the invoice of Zara-USA to the unrelated customer." *Id.* In its response to Commerce's supplemental questionnaire, Zara explained that "[t]he role of Zara-USA is minimal, . . . [a]ll customer relations are handled directly by Zara in Italy," and "US sales do not physically pass through the possession of Zara-USA." *Letter from Law Offices of David L. Simon to Sec'y of Commerce* 45 (Apr. 8, 2008) (Admin. R. Doc. No. 77) (at page 39 of the response) ("*Supplemental Resp. Letter* ").

The difficulty with plaintiff's argument is the substantial record evidence supporting Commerce's findings. Commerce concluded, on the basis of those findings, that the sales of the subject merchandise to the unaffiliated purchaser were made not by Zara SpA but instead were made by Zara-USA, after importation. *Decision Mem.* 15–16. Commerce found that invoices issued to the unaffiliated U.S. purchaser were Zara-USA's invoices and that "Zara stated in its questionnaire response that Zara sells to Zara USA, and Zara USA sells to an unaffiliated U.S. customer, who pays Zara USA." *Id.* at 16. Zara SpA's response to Commerce's supplemental questionnaire stated as follows:

> Zara-USA is the US importer of record, and so it receives an invoice from the customs broker, which it then pays. In addition, Zara-USA issues the invoices for the US sales to the arm's-length customers. . . . Zara-USA also receives the payment from US arm's-length customers, which it then deposits in its bank account in the United States.

Supplemental Resp. Letter 45 (at page 39 of the response). Based on record evidence, Commerce found as facts that "Zara USA serves as importer of record and it transfers title to the first unaffiliated purchaser in the United States." *Decision Mem.* 16. Referring to Zara-USA's activities and a company that performs them, Zara SpA stated in the supplemental questionnaire response that "[t]he accounting/consultant company that performs these services is paid from the

revenue of Zara-USA." *Supplemental Resp. Letter* 46 (at page 40 of the response). In response to a question from Commerce about why payment is made to Zara-USA and how payment is forwarded to Italy, Zara stated that

> In terms of the document flow, Zara SpA sells to Zara-USA, and Zara-USA sells to American customer. The American customer than [*sic*] pays Zara-USA. This payments [*sic*] is in the bank account of Zara-USA, and it is not sent back to Italy.
>
> Money goes from Zara-USA to Zara SpA when Zara-USA pays for the pasta invoiced to it from Zara SpA.

Supplemental Resp. Letter 48 (at page 42 of the response). In the Decision Memorandum, Commerce cites this questionnaire response as record evidence to support its finding that "by Zara's own admission, Zara USA makes the first sale to an unaffiliated customer in the United States." *Decision Mem.* 16. Commerce also found that "[t]he invoice issued to the first unaffiliated customer identifies Zara USA as the seller of subject merchandise, and the terms of sale are not finalized prior to the issuance of the invoice." *Id.* (citing *Mem. from Case Analysts, Office III, to The File* 6 (Oct. 10, 2008) (Admin. R. Doc. No. 131) ("*Verification Report* ") ("We asked how the difference in the amounts billed from Zara to Zara USA and from Zara USA to the unaffiliated U.S. customer is reflected in Zara USA's general ledger and Mr. Atkin said that it is entered in Zara USA's gross profit.")).

Upon considering the record as a whole, the court finds substantial record evidence to support the essential findings of fact upon which Commerce concluded that the sales of the subject merchandise to the unaffiliated U.S. purchaser were made by Zara-USA in the United States, after the merchandise was imported. Accordingly, the court must affirm Commerce's determination that the sales of the subject merchandise were constructed export price sales according to the requirements of the statute. *See* 19 U.S.C. § 1677a(a)-(b).

Plaintiff argues that the placement of the purchase orders and Zara SpA's "acceptance-in-fact," Pl. Br. 9, by beginning production in response to the purchase orders created a binding agreement under the UN Convention, *i.e.*, the CISG, to which the United States is a party. *Id.* at 9, 17 (citing CISG, arts. 14, 18, S. Treaty Doc. 98–9, at 25, 19 I.L.M. at 674–75). The CISG recognizes that

> if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price,

> without notice to the offeror, the acceptance is effective at the moment the act is performed, provided the act is performed within the period of time laid down in the preceding paragraph.

CISG, art. 18.3, S. Treaty Doc. 98–9, at 25, 19 I.L.M. at 675. The preceding paragraph states that "[a]n acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time . . . ." *Id.*, art. 18.2, S. Treaty Doc. 98–9, at 25, 19 I.L.M. at 675. The court does not agree that the CISG required Commerce to conclude, on the record before it, that binding agreements to sell the subject merchandise necessarily were formed when Zara SpA began production of merchandise in response to the purchase orders. Commerce was not required to view the course of dealing between Zara SpA, Zara-USA, and the single unaffiliated U.S. purchaser, on which plaintiff relies for its claim, in isolation and without also considering the evidence revealing the entire circumstances in which the three parties, in practice, arranged the transactions. Those circumstances include the practices involving invoicing. Zara SpA admits that it did not provide the unaffiliated customer a written acknowledgment of its acceptance of the purchase, *see* Pl. Br. 7–9, and it does not identify specific record evidence from which Commerce was required to conclude, contrary to other evidence on the record, that the parties unequivocally intended production against the purchase orders to constitute acceptance of the offers made by those purchase orders. In summary, plaintiff's argument would require the court to ignore the significance of the substantial record evidence supporting Commerce's factual findings. Those findings were more than adequate to support the conclusion that the sales of the subject merchandise were made by Zara-USA, after importation. The CISG did not require Commerce to ignore this substantial evidence or make findings contrary to it.

The holdings in *AK Steel*, 226 F.3d 1361, and *Corus Staal*, 502 F.3d 1370, lend no support to plaintiff's argument that the sales in question must be recognized as EP sales. Neither of these cases establishes a rule requiring Commerce, on the particular record before it, to find that an agreement, or agreements, to sell the subject merchandise to the unaffiliated U.S. customer came into existence outside of the United States and prior to importation.

B. Commerce Volunteers to Reconsider Its Classification of Zara-USA's Accounting Expenses as Direct, Rather than Indirect, Sales Expenses for Purposes of Calculating CEP

Defendant agrees with plaintiff that a remand is appropriate to allow Commerce to reconsider its decision to classify Zara-USA's accounting expenses as direct, rather than indirect, sales expenses for purposes of determining CEP. Def. Resp. 18; Pl. Br. 18–19. Defendant-intervenors contend that Commerce acted lawfully in treating the accounting expenses as direct sales expenses and that Commerce gave adequate consideration to this issue during the review, having discussed Zara's arguments in a preliminary analysis memorandum. Def.-Intervenors Resp. 30–34.

The court finds no discussion in the Final Results or the Decision Memorandum demonstrating that Commerce's final determination gave adequate consideration to Zara SpA's position on the accounting expenses in question. *Final Results*, 73 Fed. Reg. at 75,402; *Decision Mem.* 12 (addressing, at Comment 6, only petitioner's contention that Commerce made a programming error and understated Zara's U.S. direct selling expenses). The preliminary memorandum cited by defendant-intervenors, although included in the record, is not incorporated by reference into the final determination that is before the court for review. *See Final Results*, 73 Fed. Reg. 75,400; *Mem. from Case Analyst, AD/CVD Operations, Office 3, to The File* (July 30, 2008) (Admin. R. Doc. No. 110). Consequently, the decision to classify the accounting expenses as direct selling expenses is presented to the court absent any reasoning. Because the United States acknowledges that Commerce did not fully consider the question, which is discussed in neither the Final Results nor the incorporated Decision Memorandum, the court orders Commerce, on remand, to reconsider its determination to classify the accounting expenses as direct expenses and make changes as necessary.

C. Commerce Must Reconsider Its Determination that Zara SpA's Home Market Sales Occurred at a Single Level of Trade

Plaintiff claims that Commerce erred in considering Zara SpA's sales in the home market to have been made at a single level of trade ("LOT"). Pl. Br. 19. Commerce, Zara SpA argues, should have determined normal value according to the sales Zara SpA made in Italy to a group of larger customers it describes as including "wholesalers, large distribution organizations, discounters, and hypermarkets." *Id.* (quoting *Supplemental Resp. Letter* 9–20 & Ex. 7 (at pages 3–14 & Ex. 7 of the response)). Zara SpA further describes these home market

customers as "multi-location customers with their own warehouses, distribution capabilities, and strong informatics to handle electronic transactions." *Id.* Zara SpA distinguishes these customers from a second group described as "traditional local" customers, consisting of "dettaglio (small mom-and-pop convenience stores of under 150 square meters), hotels and restaurants, communities (*e.g.*, monasteries) and associations (*e.g.*, sports clubs)." *Id.* (emphasis omitted). Buyers in this second group, according to Zara SpA's questionnaire responses, typically buy pasta in smaller quantities than full palletloads and truckloads, and they purchase from inventory rather than contracting for pasta produced to order. *Id.* at 20. "These customers are all within a very small radius of distance from the Zara factory," *id.* at 19, and "have single locations, very limited storage capacity, no distribution capability, and very limited informatics." *Id.* at 20. Plaintiff argues that Commerce's combining, in a single LOT, the sales to these two groups of home market customers was not supported by substantial record evidence. *Id.*

Commerce by regulation has provided that "[t]he Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)." 19 C.F.R. § 351.412(c)(2) (2009). Qualifying this general principle, the regulation adds that "[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." *Id.* The regulation does not define what is meant by the "equivalent" of "different marketing stages," but the preamble Commerce published when promulgating the regulation ("Preamble") sheds light on the intended meaning. The Preamble explains that "Section 351.412(c)(2) states that an LOT is a marketing stage 'or the equivalent' (which means that merchandise does not necessarily have to change hands twice in order to reach the more remote LOT)." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,371 (May 19, 1997) ("*Preamble* "). Based on the clarification in the Preamble, the sales to the second group of customers plaintiff identifies would appear not to constitute a different marketing stage *per se* because these customers purchased directly from the producer, with no intermediate distributor. The question, then, is whether Commerce lawfully determined that these sales were not made at the "equivalent" of a "different marketing stage" within the meaning of 19 C.F.R. § 351.412(c)(2).

The Preamble to the Department's regulations speaks directly to the question of what must be shown to establish a different level of trade based on the equivalent of a different marketing stage:

> It is *sufficient* that, at the more remote level (*i.e.*, more remote from the factory), the seller takes on a role comparable to that of a reseller if the merchandise had changed hands twice. For example, a producer that normally sells to distributors (that, in turn, resell to industrial consumers) could make some sales directly, taking over the functions normally performed by the distributors. Such sales would be at the same LOT as the sales through the distributors. Each more remote level must be characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function. Substantial differences in the amount of selling expenses associated with two groups of sales *also* may indicate that the two groups are at different levels of trade.

Id. (emphasis added). The Preamble adds that "[a]lthough the type of customer will be an important indicator in identifying differences in levels of trade, the existence of different classes of customers is not sufficient to establish a difference in the levels of trade." *Id.*

Based on the construction of § 351.412(c)(2) set forth in the Preamble, to which construction the court gives considerable deference, the court concludes that Zara SpA could satisfy in either of two ways the requirement in § 351.412(c)(2) to demonstrate the equivalent of a different marketing stage. First, Zara SpA could show that in making sales to its traditional local customers it took over the function normally performed by a reseller, by demonstrating that it performed "an additional layer of selling activities, amounting in the aggregate to a substantially different selling function." *Id.* As the regulation states, "[s]ubstantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." 19 C.F.R. § 351.412(c)(2). According to the Preamble, the substantial differences in selling *activities* must amount in the aggregate to a substantially different selling *function* at the more remote level; hence, demonstrating adequately a different selling function, as opposed to demonstrating merely a difference in selling activities, would be "sufficient." *Preamble*, 62 Fed. Reg. at 27,371. As the Preamble also connotes through the use of the word "also," Zara SpA could demonstrate a more remote LOT through "[s]ubstantial differences in the amount of selling expenses associated with two groups of sales." *Id.* Demonstrating "[s]ubstantial differences in the amount of selling expenses" *may* be sufficient to establish a more remote LOT, the Preamble language suggests, but also might not be.

In summary, § 351.412(c)(2), as clarified by the Preamble, requires that the selling activities associated with the claimed LOT not only be

"substantially different" but also be "characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function" in which the producer takes on the role of a reseller, such as a distributor. *Id.* A respondent's claim of a separate LOT may be aided by demonstrating "[s]ubstantial differences in the amount of selling expenses associated with two groups of sales," but according to the Preamble's clarifying language (in particular, the use of the word "also"), such a demonstration is not essential to a respondent's establishing a more remote LOT. *Id.*

Zara SpA argues that in selling to its traditional local customers it performed the separate functions of a distributor as well as those of a producer. Pl. Br. 25. Plaintiff points to questionnaire responses informing Commerce that Zara SpA performs selling activities associated with the traditional local customers that it does not perform for its other customers. *Id.* at 24–27. These selling activities include, *inter alia*, manual order taking through personal visits to the customer's location, receiving and processing payments by cash or check (including dealing with bounced checks) rather than electronic funds transfer, and paying truck drivers a handling fee for taking and remitting the payments. *Id.* at 27. Zara SpA explains that virtually all of the sales made to its "multi-location" customers, *id.* at 19, are delivered by common carrier, whereas this occurs for only a third of the shipments to its traditional local customers, "with 22% picked up directly from the factory by the customer, and 45% carried in the factory's own, small delivery vans. *Id.* at 27–28. Zara SpA maintains that, because the traditional local customers do not have the storage capacity to hold large amounts of inventory, Zara SpA must devote warehouse space at its older plant to breaking down pallets consisting of a single type of product and forming new pallets, using shrink wrap to form pallets with the specific product mix needed to fill small orders of traditional local customers, as would a distributor. *Id.* at 25–26. Zara SpA also points out that selling to the traditional local customers requires "a cadre of agents to take orders and receive payments from the traditional local customers." Reply Br. of Pl. Pasta Zara SpA for J. upon the Agency R. pursuant to Rule 56.2, at 10. It adds that smaller, single-location customers that are similar to its traditional local customers, but that are not near its original plant, must buy from distributors rather than directly from Zara SpA because the company did not extend its program of marketing to these smaller customers when it opened its second plant, which is located 200 km from the original plant. Pl. Br. 28.

As it had in the Preliminary Results, Commerce found in the Final Results that Zara SpA "does not have different marketing stages or their equivalent that would support a finding of different LOTs in the home market." *Decision Mem.* 20. Specifically, Commerce found that the data in charts Zara SpA submitted (the "selling activity chart" and the "selling functions chart") did not show substantial differences in the two claimed LOTs. *Id.* at 20–21. "An analysis of the selling activities . . . shows that [Zara SpA] performs similar selling activities for different customer categories, although some of the activities were at different levels of intensity." *Id.* at 20. "Moreover, some selling activities within the claimed LOTH 1 [*i.e.*, activities performed in selling to the larger, multi-location customers] are at a higher level of intensity while other selling activities are at a lower level of intensity than the same selling activities in the claimed LOTH 2 [*i.e.*, activities performed in connection with the sales to the traditional local customers]." *Id.*

The analysis applied in the Decision Memorandum to reject Zara SpA's claim of a more remote LOT is not the analysis that the Preamble discusses when explaining the meaning of § 351.412(c)(2). Based on the selling activities and selling functions charts, the Decision Memorandum concludes that Zara SpA performed similar selling activities for the two claimed LOTs (although conceding that some of the activities were "at different levels of intensity"). *Id.* But an overlap in selling activities does not rule out a finding of different LOTs. The Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") states that "Commerce need not find that the two levels involve no common selling activities to determine that there are two levels of trade." *The Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316 (Vol. 1), at 829 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4168 ("SAA"). Here, Zara SpA identified individual selling activities that are not performed for the larger, multi-location customers, including selling activities performed by a cadre of agents who visit personally, and service the accounts of, the traditional local customers. The Preamble draws a distinction between mere differences in selling activities and differences in selling activities that establish a separate selling *function*, stating as follows:

> In other words, the statute indicates that two sales with substantial differences in selling activities nevertheless may be at the same level of trade, and the SAA adds that two sales with some common selling activities nevertheless may be at different levels of trade. Taken together, the two points establish that an analysis of selling activities alone is insufficient to establish the

> LOT. Rather, the Department must analyze selling functions to determine if levels of trade identified by a party are meaningful. In situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the levels of trade will have to be evaluated in the context of the seller's whole scheme of marketing.

Preamble, 62 Fed. Reg. at 27,371. The Decision Memorandum appears to base its rejection of Zara SpA's claim of a separate LOT comprised of the home market sales to the traditional local customers principally on a finding that Zara SpA "performs similar selling activities for different customer categories." *Decision Mem.* 20. Commerce relied on record evidence in the selling activities and selling functions charts, concluding that such record evidence did not establish differences in selling activities that Commerce found sufficient. *Id.* Absent from the Decision Memorandum is a discussion of why the separate selling *function* that Zara SpA claimed, based on record evidence of selling activities required solely to perform the sales to the traditional local customers, does not suffice to establish a "meaningful" LOT according to an analysis of the type Commerce contemplated when drafting the discussion of § 351.412(c)(2) in the Preamble. *See Preamble*, 62 Fed. Reg. at 27,371.

The Decision Memorandum also rejects Zara SpA's argument that it must break down and repackage pallets for individual small customers, stating that "the costs for breaking down pallets for shipment of individual cartons of merchandise should be accounted for in Zara's reported packing labor expenses." *Decision Mem.* 21. It rejects Zara's argument pertaining to a difference in advertising expenses because such expenses are direct expenses deducted from normal value that, according to Commerce, cannot establish different LOTs. *Id.* Similarly, it rejects Zara's argument based on differences in freight costs because freight costs are not a selling function and are deducted from the home market price. *Id.* The Decision Memorandum adds that "[t]he SAA states that the Department will ensure that expenses previously deducted from [normal value] are not deducted a second time through a LOT adjustment." *Id.*

The reasons Commerce gave in the Decision Memorandum for rejecting Zara SpA's arguments involving pallets, advertising, and freight costs do not suffice to support the determination that no separate LOT existed in the home market for the sales. The issue of the treatment of packing, advertising, and freight expenses is not the same issue as whether Zara SpA performed the selling function of a reseller, such as a wholesaler or distributor, with respect to the

traditional local customers. Instead, Commerce needed to address the precise issue presented by Zara SpA's claim of separate LOTs and thereby decide whether it was appropriate to compare the U.S. sales, all of which were made to a single large customer, with a set of home market data that included the sales to the traditional local customers. Moreover, in mentioning the need to ensure that expenses are not deducted twice through a LOT adjustment, Commerce confused the issue before it with a "double counting" issue posed by a LOT adjustment–an issue that is not presented in this case. Because Commerce failed in these respects to conduct the type of analysis required to resolve the LOT issue before it, the court must remand this issue to Commerce for reconsideration and redetermination as necessary.

Referring to the claimed differences in selling activities to the two groups of customers Zara SpA identified, defendant argues that "Commerce carefully analyzed these claimed differences and found that based on Zara's submitted information, Zara engaged in the same five selling activities, albeit at different intensities, for all of the customer categories in LOT-1 and LOT-2." Def. Resp. 16. This argument fails because the Decision Memorandum does not address specifically the selling activities required for servicing the traditional local customers and does not confront directly the issue of whether these activities constituted a substantially different selling function. *See Decision Mem.* 20–21. If these activities did constitute a substantially different selling function, an improper and inaccurate dumping margin could result from comparing the U.S. sales, all of which were made to a single large customer, with a group of home market sales that included the sales made to the traditional local customers. *See* 19 U.S.C. § 1677b(a)(1)(B)(i) (2006).

Defendant-intervenors oppose plaintiff's LOT argument on a different ground, arguing that Zara SpA is not entitled to any relief on its LOT claim because "it did not request, or demonstrate entitlement to, a LOT *adjustment* for its allegedly more remote LOT 2 sales in Italy." Def.-Intervenors Resp. 22. Defendant-Intervenors' argument relies on the SAA and appears to be based on a statutory construction under which Commerce lacks authority to determine normal value according to a set of sales in the home market that do not include the sales made at a LOT more remote than the U.S. sales. *Id.* at 25 ("The SAA does not contemplate the wholesale *exclusion* of such sales from [normal value], but only that an *adjustment* to [normal value] 'may' be appropriate.").

Defendant-intervenors' statutory construction argument finds no support in the statutory language or the SAA. The statute, in 19 U.S.C. § 1677b(a)(1)(B)(i), provides that normal value is to be deter-

mined according to the price at which the foreign like product is sold or offered for sale in the home market in the usual commercial quantities and in the ordinary course of trade "and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i). The plain meaning of the statute is that Commerce is to base normal value on home market sales that are made in the usual commercial quantities and in the ordinary course of trade, and, to the extent practicable, is to base normal value on sales that are made at the same level of trade as the CEP sales. Where some home market sales occur at the same LOT as the U.S. sales, and some occur at a more remote LOT, Commerce, under defendant-intervenors' construction, is powerless to exclude the sales at the more remote LOT and instead may address the problem posed by the lack of comparability only through a LOT adjustment or CEP offset. This construction not only is at odds with plain meaning but, by forcing Commerce to make a LOT adjustment or CEP offset that otherwise might not be needed, could waste Commerce's resources and produce a less accurate result. The court concludes that the language and intended purpose of § 1677b(a)(1)(B)(i) do not support defendant-intervenors' restrictive interpretation of the Department's discretion under that provision.

Rather than provide support, the SAA refutes defendant-intervenors' construction of § 1677b(a)(1)(B)(i). The SAA explains that, as required by § 1677b(a)(1)(B), Commerce to the extent practicable is to establish normal value based on home market (or third country) sales at the same level of trade as the constructed export price or the starting price for export price. *SAA* at 829, *reprinted in* 1994 U.S.C.C.A.N. at 4167. "If Commerce is able to compare sales at the same level of trade, it will not make any level of trade adjustment or constructed export price offset in lieu of a level of trade adjustment." *Id.* As the SAA further explains, an adjustment to normal value for LOT may be appropriate "when sales in the U.S. and foreign markets cannot be compared at the same level of trade." *Id.* Read in its proper context, the SAA informs that the determination under § 1677b(a)(1)(B)(i) of which home market sales are at the level of trade of the constructed export price (or export price) sales and the determination of a level-of-trade adjustment or constructed export price offset are different determinations. *See* 19 U.S.C. § 1677b(a)(7) (providing for LOT adjustments or CEP offsets); *SAA* at 829–30, *reprinted in* 1994 U.S.C.C.A.N. at 4167–68. In summary, the statute and the SAA confirm that Commerce, to the extent practicable, is to establish normal value based on home market sales that are made at the same level of trade as the U.S. sales. Where that is not practicable, Com-

merce is authorized to perform a level-of-trade adjustment or constructed export price offset where appropriate under § 1677b(a)(7).

IV. Conclusion

For the reasons discussed in the foregoing, the court will remand the Final Results to Commerce for reconsideration of the Department's determination to treat Zara-USA's accounting expenses as direct, rather than indirect, sales expenses for purposes of calculating constructed export price and its rejection of Zara SpA's position that normal value should have been based on a level of trade defined to exclude the home market sales to the traditional local customers. The court will affirm Commerce's determination that Zara's sales are constructed export price sales.

ORDER

Upon review of *Certain Pasta From Italy: Notice of Final Results of the Eleventh Administrative Review & Partial Rescission of Review*, 73 Fed. Reg. 75,400 (Dec. 11, 2008) (the "Final Results"), plaintiff's motion for judgment upon the agency record, the responses of defendant and defendant-intervenors, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Final Results be, and hereby are, affirmed in part and remanded in part; it is further

ORDERED that Commerce shall reconsider its decision to treat the accounting expenses of Pasta Zara-USA Inc. as indirect sales expenses for purposes of calculating constructed export price in accordance with the principles stated in this Opinion and Order; it is further

ORDERED that Commerce's decision to base normal value on all home market sales, including the sales made by Pasta Zara SpA to the traditional local customers be, and hereby is, set aside as contrary to law; it is further

ORDERED that Commerce shall reconsider its decision to base normal value on all home market sales, including the sales made by Pasta Zara SpA to the traditional local customers, and shall conduct an analysis of whether Pasta Zara SpA performed a separate selling function in making the sales to the traditional local customers, in accordance with the principles stated in this Opinion and Order; it is further

ORDERED that the Final Results be, and hereby are, affirmed with respect to Commerce's determination that the sales by Pasta Zara SpA of subject merchandise are constructed export price sales; it is further

ORDERED that Commerce shall submit its redetermination upon remand within ninety (90) days of the date of this Opinion and Order; and it is further

ORDERED that plaintiff and defendant-intervenors shall have thirty (30) days from the submission of Commerce's remand redetermination in which to file with the court comments on the remand redetermination.

Dated: April 7, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–37

ALMOND BROS. LUMBER CO. et al., Plaintiffs, v. UNITED STATES, AND RON KIRK, UNITED STATES TRADE REPRESENTATIVE, Defendants.

Before Richard K. Eaton, Judge
Court No. 08–00036

[Plaintiffs' motion for reconsideration denied.]

Dated: April 8, 2010

Saltman & Stevens, P.C. (*Alan I. Saltman, Ruth G. Tiger, Alan F. Holmer*, and *Aron C. Beezley*) for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, United States Department of Justice Commercial Litigation Branch, Civil Division (*David S. Silverbrand*); Office of the General Counsel, United States Trade Representative (*J. Daniel Stirk*), for defendants.

OPINION

Eaton, Judge:

Introduction

Before the court is plaintiffs' motion for reconsideration of the May 20, 2009,[1] opinion dismissing their cause of action for lack of subject-matter jurisdiction. *See* USCIT R. 59; *Almond Bros. Lumber Co. v. United States*, 33 CIT __, Slip Op. 09–48 (May 20, 2009) ("*Almond Bros. I* "). *See* Pls.' Mem. Supp. Mot. Reconsideration ("Pls.' Mem."); Defs.' Resp. Mot. Reconsideration ("Defs.' Resp."); and Pls.' Reply ("Pls.' Reply").

The disputed jurisdictional issue concerns the legal authority by which the United States Trade Representative ("USTR") negotiated and entered into the 2006 Softwood Lumber Agreement with Canada.

[1] Since plaintiffs filed their motion for reconsideration, the parties have made, and the court has ruled upon, various other motions. The last motion in this series (plaintiffs' October 23, 2009 motion to supplement the record, which was fully briefed on December 8, 2009), was decided on December 21, 2009. Pursuant to that order, the parties subsequently submitted supplementary testimony and objections thereto, upon which the court ruled on January 22, 2010.

See Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.—Can., Sept. 12, 2006 (hereinafter "2006 Softwood Lumber Agreement" or "2006 SLA").[2] Plaintiffs are domestic producers of softwood lumber products and, as described in *Almond Bros. I*, they seek to challenge a provision of the SLA that provides for the Government of Canada to distribute $500 million solely to domestic lumber producers who are members of the Coalition for Fair Lumber Imports (the "Coalition").

On October 21, 2009, the court heard oral argument and held an evidentiary hearing on plaintiffs' motion. *See* Evid. Hr'g Tr., Oct. 21, 2009 ("Evid. Hr'g Tr."). As they did in their papers leading to *Almond Bros. I*, plaintiffs insist that this Court has jurisdiction over their claims because, they argue, the 2006 SLA was negotiated and entered into pursuant to section 301 of the Trade Act of 1974 [19 U.S.C. § 2411(c)(1)(D) (2006)].[3] Section 301, together with the provisions that immediately follow it, are commonly referred to as "section 301." *See* Canadian Exports of Softwood Lumber, 56 Fed. Reg. 50,738, 50,739 (initiation of section 302 investigation and request for public comment on determinations involving expeditious action) ("Oct. 8, 1991 Initiation & Determination"). In *Almond Bros. I*, the court found that plaintiffs failed to provide any evidence for this asserted source of jurisdiction: "Beyond the bare claim that the SLA was the product of

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[2] A copy of the 2006 Softwood Lumber Agreement is available in the library of the United States Court of International Trade.

[3] Section 301 of the Trade Act of 1974 is codified at 19 U.S.C. § 2411(c). Under § 2411(c)(1)(D), if the USTR determines that the rights of the United States under any trade agreement are being denied, or that an act, policy, or practice of a foreign country violates a United States trade agreement or burdens or restricts United States commerce, the USTR is authorized to

> enter into binding agreements with such foreign country that commit such foreign country to—
>
> > (i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section,
> > (ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or
> > (iii) provide the United States with compensatory trade benefits that—
> >
> > > (I) are satisfactory to the Trade Representative, and
> > > (II) meet the requirements of paragraph (4).

19 U.S.C. § 2411(c)(1)(D).

Paragraph 4 of § 2411(c) provides:

> (4) Any trade agreement described in paragraph (1)(D)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section
> . . . .

19 U.S.C. § 2411(c)(4).

[section 301], . . . plaintiffs provide no support for their contention that it was negotiated or executed pursuant to that statute, despite having ample opportunity to do so." 33 CIT at __, Slip Op. 09–48 at 17. Here, the court again finds that plaintiffs have failed to present any evidence that would support their argument for jurisdiction. Accordingly, plaintiffs' motion for reconsideration is denied.

Background

I. History of the Softwood Lumber Disputes Between the United States and Canada

A. 1986 Memorandum of Understanding and 1996 Softwood Lumber Agreement

While the history of the 2006 SLA has been thoroughly set out in *Almond Bros. I*, plaintiffs' sole new argument requires an examination of the history of other softwood lumber disputes prior to the negotiation of the 2006 agreement. Since the early 1980s, the United States has continually quarreled with Canada over its alleged dumping and subsidization of softwood lumber exports to the U.S. *See generally* David Quayat, *The Forest for the Trees: A Roadmap to Canada's Litigation Experience in Lumber IV*, 12 J. Int'l Econ. L. 115, 122 (2009) ("Quayat").

In 1986, United States lumber producers filed unfair trade petitions with the Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC"). *See* Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,454 (Dep't of Commerce Oct. 22, 1986) (preliminary affirmative countervailing duty determination). In October 1986, Commerce issued an affirmative preliminary determination of subsidization. *See id.* at 37,453. Subsequently, the two countries began negotiations. Quayat, 12 J. Int'l Econ. L. at 123. In December 1986, they entered into a Memorandum of Understanding (the "1986 MOU") pursuant to which Canada agreed to impose a tax or charge on softwood lumber exports to the U.S. and the United States agreed to discontinue its investigations. *Id.* at 123 n.55; *see also* Oct. 8, 1991 Initiation & Determination, 56 Fed. Reg. at 50,739.

In September 1991, Canada announced that it would terminate the 1986 MOU, meaning that it would no longer collect the export taxes provided for in that document. Oct. 8, 1991 Initiation & Determination, 56 Fed. Reg. at 50,739. In response, in October 1991, the USTR initiated an investigation to determine whether Canada's unilateral termination of the 1986 MOU was actionable under section 301, *i.e.*, whether Canada's failure "to ensure the continued collection of export

charges on softwood lumber envisioned by the MOU" was unreasonable and burdened or restricted United States commerce (the "1991 Investigation"). *Id.* Following the 1991 Investigation, the USTR determined that

> acts, policies, and practices of the Government of Canada regarding the exportation of softwood lumber to the United States, *specifically the failure of the Government of Canada to ensure the continued collection of export charges on softwood lumber envisioned by the MOU*, are unreasonable and burden or restrict U.S. commerce . . . .

Id. (emphasis added).

The failure of Canada to collect the export charges was resolved when Canada and the United States signed the 1996 Softwood Lumber Agreement (hereinafter "1996 SLA"). *See* Canadian Exports of Softwood Lumber, 61 Fed. Reg. 28,626, 28,626 (Office of USTR June 5, 1996) (notice of agreement; monitoring and enforcement pursuant to sections 301 and 306) ("Notice of 1996 SLA"). The agreement was

> intended to provide a satisfactory resolution to certain acts, policies and practices of the Government of Canada affecting exports to the United States of softwood lumber that were the subject of an investigation initiated by the United States Trade Representative ("USTR") under section 302(b)(1)(A) of the Trade Act of 1974 . . . and that were found to be unreasonable and to burden or restrict U.S. commerce pursuant to section 304(a) on October 4, 1991.

Id. As noted, the "acts" that were "found to be unreasonable" were Canada's failure to collect the export charges provided for in the 1986 MOU. October 8, 1991 Initiation & Determination, 56 Fed. Reg. at 50,739. The 1996 SLA expired by its terms in 2001. *See* Notice of 1996 SLA, 61 Fed. Reg. at 28,626.

In May 2002, the Coalition filed new petitions with the ITC and Commerce, and, after investigations, Commerce imposed both antidumping duties and countervailing duties on Canadian softwood lumber. Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36,068 (Dep't of Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36,070 (Dep't of Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and countervailing duty order). As a result of Commerce's imposition of these unfair

trade duties, legal challenges arose in various fora including: this Court; tribunals under the North American Free Trade Agreement; and the World Trade Organization. *Almond Bros. I*, 33 CIT __, Slip Op. 09–48 at 8.[4] The Coalition was one of the parties to many of these challenges. *Id.*

B. The 2006 Softwood Lumber Agreement

In 2006, the United States and Canada began new negotiations to resolve the proceedings arising from the 2002 imposition of unfair trade duties. The negotiations proved successful, and in September of that year the USTR and the Canadian representative executed the 2006 SLA. *See generally* 2006 Softwood Lumber Agreement.

Among other things, the 2006 SLA required Canada to distribute $500 million to United States lumber producers identified as members of the Coalition. Plaintiffs, domestic lumber producers, were not members of the Coalition, and thus were not designated as beneficiaries of the distributed funds. *See Almond Bros. I*, 33 CIT at __, Slip Op. 09–48 at 6–9 (detailing plaintiffs' claims).

II. Procedural History

In *Almond Bros. I*, the court granted defendants' motion to dismiss plaintiffs' lawsuit based on a lack of subject-matter jurisdiction. In their papers, plaintiffs had insisted that this Court had jurisdiction over their claims pursuant to the "arising under" provisions of 28 U.S.C. § 1581(i).[5] *Almond Bros. I*, 33 CIT at ___, Slip Op. 09–48 at 17.[6] The sole statutory authority cited by plaintiffs as the basis for § 1581(i) arising under jurisdiction over their case was section 301.

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[4] A list of these proceedings may be found in the 2006 Softwood Lumber Agreement, Annex 2A.

[5] 28 U.S.C. § 1581(i) states:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for– . . .

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . .

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[6] As discussed in *Almond Bros. I*, the Court of International Trade, like all federal courts, is a court of limited jurisdiction, meaning that it may only review matters within certain boundaries. 33 CIT at ___, Slip Op. 09–48 at 15–17 (citing *Agro Dutch Indus. Ltd. v. United States*, 29 CIT __, __, 358 F. Supp. 2d 1293, 1294 (2005) (citation omitted)). A primary source of federal jurisdiction rests in "arising under" jurisdiction, provided for under 28 U.S.C. § 1331, which grants jurisdiction to the federal district courts for claims "arising under" federal law. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction over all

> [P]laintiffs maintain that the court has § 1581(i) jurisdiction because the SLA was negotiated pursuant to [section 301], which provides for the entry into agreements that provide for compensatory trade benefits. For plaintiffs, these compensatory trade benefits are the equivalent of duties. *See* 28 U.S.C. § 1581(i)(2) ("the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . duties . . . on the importation of merchandise for reasons other than the raising of revenue . . . .").

Almond Bros. I, 33 CIT at __, Slip Op. 09–48 at 14 (footnote omitted). The court in *Almond Bros. I*, however, found that plaintiffs did not provide factual support for their theory that the 2006 SLA was negotiated or entered into pursuant to section 301: "Because [plaintiffs] have failed to meet their burden of pleading facts from which the court could conclude that the SLA was indeed the product of [section 301], the court cannot accept plaintiffs' argument that it has jurisdiction under the arising under provisions of § 1581(i)." 33 CIT at __, Slip Op. 09–48 at 24–25 (citation omitted).

Discussion

I. Standard of Review

"The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *NSK Corp. v. United States*, 32 CIT __, 593 F. Supp. 2d 1355, 1361 (2008) (quotation and citation omitted); USCIT R. 59(a)(2).

II. Parties' Arguments

As noted, the central jurisdictional issue in this case is whether the 2006 SLA was negotiated and entered into pursuant to section 301. In

civil actions arising under the Constitution, laws, or treaties of the United States."); *see* Wright, Miller, & Cooper, 13D Fed. Prac. & Proc. 3d § 3562. Accordingly, the law under which the 2006 SLA was entered into is crucial to plaintiffs' claims.

The statute under which plaintiffs claim jurisdiction, 28 U.S.C. § 1581(i)(4), is also an "arising under" statute. *See* 28 U.S.C. § 1581(i)(2) (actions arising out of a law providing for duties on the importation of merchandise other than for raising revenue) and § 1581(i)(4) (actions arising out of the administration and enforcement of paragraph (2) of this subsection); *Schick v. United States*, 554 F.3d 992, 994 (Fed. Cir. 2009) (finding that the trial court lacked jurisdiction to consider claim under § 1581(i)(4) where claim did not arise out of a law providing for the administration and enforcement of matters referred to in 19 U.S.C. § 1641(g)(2)).

Almond Bros. I, the court observed,

> The party seeking to invoke this Court's jurisdiction has the burden of establishing such jurisdiction." *Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005) (citations omitted) ("*Autoalliance Int'l* "). A "mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling . . . ." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quotation omitted). "To avoid dismissal in whole or in part for lack of subject matter jurisdiction, [plaintiffs] must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of their claims." *Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) ("Schick") (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (explaining that a plaintiff "must allege in his pleading the facts essential to show jurisdiction.")).

33 CIT at __, Slip Op. 09–48 at 10. Moreover, "while jurisdictional facts are normally found in the complaint, it is well settled that in considering a Rule 12(b)(1) motion contesting jurisdiction, the court may consider matters outside the pleadings." *Id.* at __, Slip Op. 09–48 at 19 (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Cedars-Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993)). Plaintiffs' motion includes several arguments as to why they have satisfied their burden of pleading facts sufficient to demonstrate jurisdiction, but presents only one theory that has not previously been put before the court. That is, that the October 8, 1991 section 301 investigation and its determinations underlie the 2006 SLA as well as the 1996 SLA.

As an initial matter, it is worth noting that plaintiff's arguments with respect to the effect of the October 8, 1991 section 301 investigation could and should have been raised in their previous arguments before the court and not in their motion for reconsideration. That is, all of the material facts were known to them long prior to making of their motion. For this reason alone, plaintiff's motion should be denied. *See Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003) (It is generally accepted that a party may not, on a motion for reconsideration, advance a new argument that could (and should) have been presented prior to the . . . court's original ruling."). Nonetheless, the court will address the new argument.

As the court noted in *Almond Bros. I*, prior to initiating negotiations for an agreement under section 301, the USTR must fulfill

certain statutory obligations relating to the initiation of investigations and the making of determinations, including certain publication requirements. *Almond Bros. I*, 33 CIT at __, Slip Op. 09–48 at 22–23. Specifically, the sections succeeding 19 U.S.C. § 2411 set out the steps that the USTR must undertake before action can be taken thereunder:

> If the Trade Representative determines that an investigation should be initiated under this subchapter with respect to any matter in order to determine whether the matter is actionable under section [301] of this title, the Trade Representative shall publish such determination in the Federal Register and shall initiate such investigation.

19 U.S.C. § 2412(b)(1)(A) (this subsection is commonly referred to as "section 302").[7]

Moreover, if the USTR makes any factual determination pursuant to § 2414(a) (*i.e.*, that an act, policy or practice of a foreign country is unjustifiable and burdens or restricts United States commerce), that determination, too, must be published in the Federal Register pursuant to 19 U.S.C. § 2414(c) ("The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1) of this section, together with a description of the facts on which such determination is based.").[8] In practice, the USTR has published the notice of initiation and the factual determination simultaneously. *See, e.g.*, Canada—Compliance With Softwood Lumber Agreement, 74 Fed. Reg. 16,436, 16,436 (Office of the USTR Apr. 10, 2009) (notice of initiation of investigation of and determination that Canada "is denying U.S. rights under the SLA"). In *Almond Bros. I*, the court found that none of the required acts necessary for action to be taken pursuant to section 301 had been performed and, therefore, that the 2006 SLA was not a product of that section. *Almond Bros. I*, 33 CIT at __, Slip Op. 09–48 at 22–24.

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[7] 19 U.S.C. § 2412 sets out the procedures for the required investigation. *See, e.g.*, Wheat Trading Practices of the Canadian Wheat Board, 65 Fed. Reg. 69,362, 69,363 (Office of the USTR November 16, 2000) (notice announcing the initiation of an "investigation to determine whether certain acts, policies or practices of the Government of Canada and the Canadian Wheat Board with respect to wheat trading are unreasonable and burden or restrict U.S. commerce and are, therefore, actionable under section 301.").

[8] It is worth noting that the USTR has sought to comply with the section 301 provisions relating to investigations and determinations when seeking to enforce the 2006 SLA. *See* Canada—Compliance With Softwood Lumber Agreement, 74 Fed. Reg. 16,436, 16,436 (Office of the USTR Apr. 10, 2009) (notice of initiation of investigation of and determination that Canada "is denying U.S. rights under the SLA"). Thus, it is clear that the USTR knows how to comply with section 301 when he or she wishes to take action pursuant to its provisions.

Plaintiffs now claim that the mandatory prerequisite actions were taken and that the section 301 publication requirements were met with respect to the 2006 SLA. According to plaintiffs, the October 8, 1991 publication, giving notice of the 1991 section 301 investigation and October 8, 1991 determination that underpinned the 1996 SLA, also provided the basis for the 2006 SLA. *See* Evid. Hr'g Tr. 14–15.

> [I]n 1996, the USTR entered a softwood lumber agreement (the "1996 SLA") which, just like the 2006 SLA, was intended to ameliorate the effect of the export of subsidized softwood lumber products from Canada to the United States without the imposition of any export charges. The USTR entered into the 1996 SLA pursuant to [section 301] on the basis of an earlier [1991] investigation initiated under § 2412 and a determination made under § 2414 that Canada's conduct was unreasonable and burdened or restricted United States commerce. Because the situation in 2006 in all relevant respects was the same as it had been in 1996, these findings and determination remained valid.

Pls.' Mem. 3. Accordingly, plaintiffs contend, "[b]ased on these [1991] findings and the [1991] determination, the USTR entered into the 2006 SLA pursuant to [section 301], just as her predecessor had entered the 1996 SLA." Pls.' Mem. 3. In other words, plaintiffs argue that the 1991 investigation satisfied the requirements for an affirmative determination under § 2414(a) and publication of that determination under § 2414(c), both of the necessary procedural steps for the 2006 SLA to have been authorized under the authority of section 301. Plaintiffs make this claim notwithstanding their concession that the 1991 determination and publication served as the section 301 predicates for the intervening 1996 SLA that expired by its terms in 2001.

In response to plaintiffs' allegations, defendants argue that plaintiffs' contention that "because the USTR used its section 301 authority to impose retaliatory measures upon imports of softwood lumber in 1991 and to enter into the Softwood Lumber Agreement of 1996, the USTR must have entered into the [2006] SLA pursuant to Section 301," is "without basis." Defs.' Resp. 6. Rather, defendants argue, "no part of the negotiations or entry into force of the [2006] SLA entailed any statutory authority derived from section 301." Defs.' Resp. 6.

III. Plaintiffs Fail to Present Facts Sufficient for the Court to Find Jurisdiction over Their Claims

Plaintiffs' primary argument is that the 1991 investigation satisfied the mandatory section 301 requirements for entry into the 2006 SLA

because "the situation in 2006 in all relevant respects was the same as it had been in 1996, [and thus the 1991] findings and determination remained valid." Pls.' Mem. 3. Contrary to plaintiffs' contentions, however, the publication of USTR's Oct. 8, 1991 Initiation & Determination does not serve to satisfy the section 301 statutory prerequisites necessary for the entry into the 2006 SLA. As the United States points out, the 1991 Investigation was initiated as a result of Canada's withdrawal from the 1986 MOU and subsequent failure to collect export charges. Following this September 1991 withdrawal, the USTR initiated an investigation, pursuant to section 301, to determine whether Canada's failure "to ensure the continued collection of export charges on softwood lumber envisioned by the MOU" was unreasonable and burdened or restricted United States commerce. Oct. 8, 1991 Initiation & Determination, 56 Fed. Reg. at 50,739. In other words, the stated purpose of the 1991 Investigation was to determine if the failure of Canada to collect the export taxes, provided for in the 1986 MOU, was "unreasonable" and "burden[ed] or restrict[ed]" United States commerce. Thus, the 1991 Investigation and Determination dealt with a particular set of facts extant during a particular period of time.

This point is brought home by the USTR's 1991 factual determination:

> On September 3, 1991, the Government of Canada announced that it would terminate the MOU in 30 days. . . .
>
> Since the Government of Canada has refused to *collect export charges to offset possible subsidies during this period*, the United States is compelled to exercise its rights and to take enforcement measures arising out of the MOU by imposing temporary measures to safeguard against an influx of possible injurious subsidized Canadian softwood lumber. . . .
>
> On October 4, 1991, the USTR, having consulted pursuant to section 302(b)(1)(B) [19 U.S.C. § 242(b)(1)(B)] of the Trade Act, determined that an investigation should be initiated with respect to certain acts, policies, and practices by the Government of Canada affecting exports to the United States of certain softwood lumber products. . . .
>
> Accordingly, the USTR, at the specific direction of the President, has made the following determinations pursuant to section 304 of the Trade Act [including] [t]hat acts, policies, and practices of the Government of Canada regarding the exportation of softwood lumber to the United States, *specifically the failure of the Government of Canada to ensure the continued collection of*

> *export charges on softwood lumber envisioned by the MOU*, are unreasonable and burden or restrict U.S. commerce . . . .

Oct. 8, 1991 Initiation & Determination, 56 Fed. Reg. at 50,738–39 (emphasis added). Thus, the 1991 factual determination made a specific finding with respect to the collection of export taxes that were required by the 1986 MOU.

The question of the harm found by the USTR in 1991 was subsequently resolved by the entry into the 1996 SLA. Notice of 1996 SLA, 61 Fed. Reg. at 28,626. The important point, however, is that the 1996 SLA resulted from Canada's failure, in 1991, to collect the taxes required by the 1986 MOU which failure was found to be unreasonable and to burden or restrict United States commerce. Thus, the specifics found in the 1991 Investigation and set out in the determination related directly to Canada's withdrawal from the 1986 MOU, and not to more general concerns about softwood lumber dumping or subsidization.

In addition, although plaintiffs insist otherwise, the factual situation in 2006 was markedly different from that in 1991. In 1991, when Canada terminated the 1986 MOU, no dumping or countervailing duty orders were in place. Thus, neither the 1991 Investigation nor the October 8, 1991 determination took antidumping duty orders into account.[9] However, by 2006, determinations regarding both dumping and countervailing duties existed and were being contested. *See supra* p.7. The settlement of these cases was the primary subject of the negotiations in 2006. *See Tembec, Inc. v. United States*, 31 CIT 241, 244, 475 F. Supp. 2d 1393, 1397 (2007) ("On September 12, 2006, the Governments of Canada and the United States signed an agreement designed to settle the softwood lumber dispute . . . ."). Pursuant to the 2006 SLA, both governments, as well as all represented parties and participants, agreed to terminate the legal actions related to softwood lumber to which they were parties. *See* Softwood Lumber Agreement, art. II and Annex 2A. Therefore, the facts demonstrate that the 2006 SLA was intended to resolve the controversies arising from the imposition of specific unfair trade duties on Canadian softwood lumber.

As has been seen, plaintiffs still fail, on their motion for reconsideration, to present facts that would put this case within this Court's

[9] Following the October 8, 1991 Initiation & Determination relating to the 1991 Investigation, Commerce self-initiated a countervailing duty investigation (Certain Softwood Lumber Products From Canada, 56 Fed. Reg. 56,055, 56,055 (Dep't of Commerce October 31, 1991) (self-initiation of countervailing duty investigation)), resulting in an affirmative final determination that imposed a countervailing duty of 6.51%. Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,570 (Dep't of Commerce May 28, 1992) (final affirmative countervailing duty determination). The issue of the imposition of these duties was also resolved by the 1996 SLA. *See* Notice of 1996 SLA, 61 Fed. Reg. at 28,626.

jurisdiction. "To avoid dismissal in whole or in part for lack of subject matter jurisdiction, [plaintiffs] must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of their claims." *Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) (citation omitted). After plaintiffs filed their motion for reconsideration, the court undertook to determine if there were any jurisdictional facts that had been overlooked in *Almond Bros. I*. To make this determination, the court ordered further oral argument and an evidentiary hearing. At the October 21, 2009 evidentiary hearing, plaintiffs called no witnesses to support their position, despite having previously deposed the chairman of the section 301 committee[10] from the time of the negotiations for the 2006 SLA until now. Specifically, defendants made available for deposition William Busis, who

> has held the position of section 301 chairman continuously since the negotiations leading to the [2006] SLA began and, therefore, would possess knowledge of any actions the USTR has taken pursuant to section 301 during that time, including whether the United States entered the SLA pursuant to the provisions of 19 U.S.C. [§] 2411(c)(1)(D).

Defs.' Resp. Pls.' Mot. for Leave to Take Depositions 5.

In fact, the only evidence that was presented to the court, tending to establish the source of the USTR's authority to enter into the 2006 SLA, indicates that it was negotiated not pursuant to section 301, but pursuant to the USTR's general authority, including that found in 19

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[10] "The Chairman of the Section 301 Committee shall be designated by the Deputy Special Representative from the Office of the Special Representative for Trade Negotiations." 15 C.F.R. § 2002.3 (2009). The Section 301 Committee performs the following functions:

> (1) Reviews complaints received pursuant to section 301 of the Trade Act of 1974.
> (2) Provides an opportunity by the holding of public hearings upon request by a complainant or an interested party, as appropriate, and by such other means as the Special Representative, a Deputy Special Representative or the Chairman of the Section 301 Committee deems appropriate, for any interested party to present his views to the Section 301 Committee concerning foreign restrictions, acts, policies, and practices affecting U.S. commerce, and United States actions in response thereto, as provided for in Section 301 of the Trade Act (Pub.L. 93–618, 88 Stat. 1978).
> (3) Reports to the Trade Policy Staff Committee the results of reviews and hearings conducted with respect to complaints received pursuant to Section 301 of the Trade Act.
> (4) On the basis of its review of petitions filed under Section 301 and of the views received through hearings or otherwise on such petitions, makes recommendations to the TPSC for review by that committee.

15 C.F.R. § 2002.3(b).

U.S.C. § 2171.[11] Defendants' Hearing Exhibit B includes a letter regarding the 2006 SLA that was submitted to the United States Department of State on October 1, 2007, seeking guidance on the necessary compliance with the Case-Zablocki Act, codified at 1 U.S.C. § 112b. The Act requires that international agreements, other than treaties, be transmitted to Congress within sixty days after the agreements have entered into force.[12] Attached to the letter is a background statement identifying the legal authority under which the SLA was negotiated and entered into:

> The agreement was concluded under the general authority of the Office of the United States Trade Representative to negotiate, including pursuant to USTR's authority under the Trade Act of 1974, as amended.

Letter from Carmen Suro-Bredie to John Kim, Esq. (Oct. 1, 2007).

For the court, this statement supports defendants' contention that the 2006 SLA was the product of the USTR's general authority, including § 2171, and not the specific authority found in section 301. This is because § 2171 is part of the Trade Act of 1974 and provides for the USTR's general authority as "the chief representative of the United States for international trade negotations." 19 U.S.C. § 2171(c)(1)(C).

Plaintiffs, however, dispute this conclusion and argue that the phrase "under the Trade Act of 1974″ introduces ambiguity into the sentence. Evid. Hr'g Tr. 9–10, 19. Specifically, plaintiffs contend that there was no need to include the latter phrase if § 2171 were indeed the authority under which the 2006 SLA was negotiated and entered into, because § 2171 itself outlines the general authority of the USTR.

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[11] By 19 U.S.C. § 2171, the USTR was established within the Executive Office of the President and has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy, . . . and shall be the chief representative of the United States for . . . international trade negotiations . . . ." 19 U.S.C. § 2171(c)(1)(A), (C).

[12] 1 U.S.C. § 112b(a) states:

> The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.

Evid. Hr'g Tr. 9–10, 19. Put another way, plaintiffs contend that if the 2006 SLA were the product of the USTR's general authority, it would be redundant to say "including pursuant to the USTR's general authority under the Trade Act of 1974 . . . ." Plaintiffs then note that section 301 is also part of the Trade Act of 1974 and that the Exhibit B letter may, in fact, make reference to that section. For plaintiffs, their reading would move the sentence from the less specific "general authority" to the more specific provisions of section 301. Thus, plaintiffs claim, if § 2171 were truly the source of authority for the 2006 SLA, the recitation that the agreement was "concluded under the general authority of the Office of the United States Trade Representative" would have sufficed. Therefore, according to plaintiffs, the inclusion of more specific language citing the Trade Act of 1974 leaves open the possibility that the USTR was acting under both the general authority of section 2171, and the more specific authority of section 301, when negotiating the 2006 SLA.

Despite plaintiffs' contentions, the court sees no ambiguity. This is because the general authority of the USTR does not derive solely from the Trade Act of 1974. The USTR is part of the Executive Office of the President. 19 U.S.C. § 2171(a); Office of the United States Trade Representative, Mission of the USTR, http://www.ustr.gov/about-us/mission (last visited Mar. 16, 2010). "[T]he USTR, a member of the Executive Office of the President, acts at the direction of the President as his negotiating arm in international trade matters." *Gilda Indus., Inc. v. United States*, 28 CIT 2001, __, 353 F. Supp. 2d 1364, 1369 (2004) (citing 19 U.S.C. § 2171), *aff'd in part, vacated in part, and remanded on other grounds*, 446 F. 3d 1271 (Fed. Cir. 2006).

Both the President and the USTR are officers of the United States. *Motion Systems Corp. v. Bush*, 28 CIT 806, 813, 342 F. Supp. 2d 1247, 1254 (2004).

> With respect to the President, status as an officer of the United States stems from the Constitution itself, for the President is the essential constitutional officer under Article II of the Constitution. "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years . . . . " U.S. CONST., Art. II, § 1. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

Id. The President's authority to conduct foreign policy derives mainly from the United States Constitution. *See* U.S. CONST. art. II, § 2, cl. 1. The USTR, in acting on behalf of the President, derives his or her authority from both the Constitution and from statutes such as § 2171. Thus, a reference to both the USTR's general authority and to more specific statutory authority creates no ambiguity. That is, the reference in the October 1, 2007 letter to "the general authority" of the USTR followed by a specific reference "including [the] USTR's authority under the Trade Act of 1974″ proceeds from the general to the specific: *i.e.*, the reference to the USTR's general authority that derives mainly from the Constitution; and the reference to the Trade Act of 1974, meaning the statutory grant of general power found in § 2171.

Conclusion

Having reviewed all of the parties' submissions and having heard their oral arguments and reviewed the evidence presented at the evidentiary hearing, the court finds that, even taking into account plaintiffs' arguments raised for the first time here, they have failed to provide any evidence that would require reconsideration of the decision that this Court lacks subject- matter jurisdiction over plaintiffs' claims. Therefore, plaintiffs' motion for reconsideration is denied.

Dated: April 8, 2010
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Errata

Almond Bros. Lumber Co. et al v. United States, Court No. 08–00036, Slip Op. 10–37 (Apr. 8, 2010)

Page 11, line 21: Insert "“" at beginning of block quote.

Page 13, line 6: Insert "“" before "It" inside parenthetical.

Slip Op. 10–38

NSK CORPORATION, *et al.*, PLAINTIFFS, AND FAG ITALIA S.P.A., *et al.*, PLAINTIFF-INTERVENORS, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, DEFENDANT-INTERVENOR.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[The court sustains in part and remands in part the second remand determination of the U.S. International Trade Commission, the agency acting on behalf of Defendant.]

Dated: April 12, 2010

Crowell & Moring LLP (*Matthew P. Jaffe, Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Sidley Austin LLP (*Neil R. Ellis* and *Jill Caiazzo*), for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia S.p.A., Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley* and *Alice A. Kipel*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, James M. Lyons (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), and *David A.J. Goldfine*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart, Eric P. Salonen, Elizabeth A. Argenti*, and *Philip A. Butler*), for Defendant-Intervenor The Timken Company.

OPINION & ORDER

Barzilay, Judge:

Introduction

This case returns to the court following the U.S. International Trade Commission's (the "Commission") second remand determination on the sunset review from 2000 to 2005 of certain antidumping duty orders covering ball bearings from Japan and the United Kingdom.[1] *Views of the Commission on Remand*, Inv. Nos. 731–TA–394–A, 731–TA–399–A (Jan. 5, 2010) ("*Second Remand Determination* "). In *NSK Corp. v. United States*, 32 CIT ___, 577 F. Supp. 2d 1322 (2008) ("*NSK I* "), as further directed by *NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355 (2008) ("*NSK II* "), and *NSK Corp. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1311 (2009) ("*NSK III* "), the court affirmed in part and remanded in part the Commission's sunset review of the subject antidumping duty orders. While the lack of substantial evidence undercut some of the agency's findings, the bulk of the court's concerns centered on the Commission's failure to suffi-

[1] The court presumes familiarity with the procedural history of the case.

ciently address certain evidence on global restructuring within the ball bearings industry and the significant presence of non-subject imports in the United States market. *See generally NSK III*, 33 CIT ___, 637 F. Supp. 2d 1311; *NSK II*, 32 CIT ___, 593 F. Supp. 2d 1355; *NSK I*, 32 CIT ___, 577 F. Supp. 2d 1322. In August 2009, the court remanded the Commission's affirmative injury determination for a second time, and asked the agency to reconsider (1) whether the Commission may cumulate ball bearings from the United Kingdom with other subject imports, (2) the likely impact of subject imports on the domestic industry upon revocation of the antidumping duty orders, and (3) whether the subject imports likely would constitute more than a minimal or tangential cause of material injury to the domestic industry in the absence of the subject orders. *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1328–29. In the *Second Remand Determination*, currently at issue, the Commission does not support part of its cumulation analysis with substantial evidence, and the court therefore cannot address the merits of the remaining two issues and, consequently, remands the case to the agency.

II. Standard of Review

The Court cannot sustain an agency determination "unsupported by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B)(i). An agency supports its findings with substantial evidence when it offers "more than a mere scintilla" of relevant and reasonable evidence to buttress the conclusion. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). To provide the requisite support, the agency must offer more than conjecture. *See NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citation omitted). Although the court does not require perfection from the agency in its explanations, the path taken by the administrative body "must be reasonably discernible." *Id.* at 1319 (citation omitted). At a minimum, the agency must explain the standards applied and rationally connect them to the conclusions drawn from the record. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). That evidence drawn from the record could support two opposing conclusions "does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted), and the court may not displace the agency's choice for its own. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). However, an administrative law touchstone requires the agency to address the evidence from which conflicting

inferences may be drawn in its analysis. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

III. Discussion

A. The Cumulation of Ball Bearings from the United Kingdom with Other Subject Imports

In a sunset review, the Commission may cumulate unfairly traded imports from multiple countries to adequately capture the goods' simultaneous injurious effects on the domestic industry that might otherwise be obscured in the agency's country-by-country review of the subject imports. *See* 19 U.S.C. § 1675a(a)(7); *Neenah Foundry Co. v. United States*, 25 CIT 702, 708–09, 155 F. Supp. 2d 766, 772 (2001) (quoting H.R. Rep. No. 100–40, pt. 1, at 130 (1987)).[2] The statute qualifies the agency's discretion and sets forth the following conditions precedent to cumulation: (1) all subject reviews must have been initiated on the same day; (2) the subject imports must likely compete with each other and with domestic like products in the United States market; and (3) and the Commission must determine that the subject imports likely will have a discernible adverse impact on the domestic industry. § 1675a(a)(7). With respect to the final prong, the Commission must conclude that the likely impact will be both discernible and adverse, though no statutory provision enumerates the factors that the Commission must consider in its analysis. *See Neenah Foundry Co.*, 25 CIT at 712–13, 155 F. Supp. 2d at 775. In its analysis, "the Commission generally considers the likely volume of subject imports and the likely impact of such imports on the domestic industry within a reasonably foreseeable time" in the absence of the orders.[3] *Allegheny Ludlum Corp. v. United States*, 30 CIT 1995, 2000, 475 F. Supp. 2d 1370, 1376 (2006) (citation omitted). While the impact standard may be met "easily," the Court has found that

> a reasonable finding of likely discernible adverse impact requires that the [Commission] establish that it is likely that [the producer] could obtain a discernible amount of [the subject prod-

[2] The Federal Circuit recently reasserted the Commission's discretion whether to cumulate subject imports in a sunset review and the rationale supporting such a measure. *Nucor Corp. v. United States*, Appeal No. 09–1234, slip op. at 3, 9 (Fed. Cir. Apr. 7, 2010). Notably, the agency declined to cumulate certain subject imports under conditions of competition and other facts similar to this case. *See id.* at 4–6.

[3] The term "likely" means "probable" or "more likely than not," and requires more than mere possibility. *Weiland-Werke AG v. United States*, 31 CIT 1884, 1890, 525 F. Supp. 2d 1353, 1361–62 (2007) (quotation marks & citations omitted), *aff'd*, 290 F. App'x 348 (Fed. Cir. 2008).

> uct] from somewhere — such as by exploiting excess capacity, by shifting from domestic and internal production, or by shifting from other export markets — and would have some incentive to sell a discernible amount into the U.S. market.

Cogne Acciai Speciali S.p.A. v. United States, 29 CIT 1168, 1173 (2005) (not reported in F. Supp.) ("*Cogne* "); *accord Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1379 (Fed. Cir. 2007) ("Nippon Steel"); *see also Usinor Industeel, S.A. v. United States*, 27 CIT 1395, 1403 (2003) ("Usinor") (not reported in F. Supp.), *aff'd*, 112 F. App'x 59 (Fed. Cir. 2004). Inherent in the language of these cases lies the requirement that the incentive likely would lure those additional exports specifically toward the United States in the absence of the order.[4] *Nippon Steel*, 494 F.3d at 1379 (finding that higher prices in domestic market attracted "any" excess production of subject goods and caused "potential redirection" from other countries specifically to United States); *Cogne*, 29 CIT at 1173 (noting Commission must establish that some incentive likely would drive subject producer to direct discernible amount of subject goods particularly to United States); *Usinor*, 27 CIT at 1403 (upholding affirmative cumulation determination where Commission presented evidence that subject producers were export oriented and had demonstrated interest in exporting their products specifically to United States).

In *NSK III*, the court found that the Commission failed to complete its cumulation analysis in the first remand determination in accordance with law and to support its determination with substantial evidence. 33 CIT at ___, 637 F. Supp. 2d at 1325–27. First, the court asked the Commission to revisit its analysis on the large-scale restructuring within the ball bearing market and the significant rise in non-subject imports in the United States market, *id.* at ___, 637 F. Supp. 2d at 1327, since the effect from those two elements "might have skewed its analysis of the domestic industry's level of vulnerability" and the agency's discernible adverse impact analysis. *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338. Next, on the question of restructuring, the court asked the Commission (1) to reevaluate the vulnerability of the domestic industry and to consider the conflicting evidence on the record showing that companies within the domestic industry "restructure[d] their U.S. business platform for reasons to-

[4] The standard does not require the Commission to determine that the incentive likely would cause subject producers to export the discernible amount of the subject merchandise *only* to the United States and, thus, does not foreclose the possibility that the subject producers may divert some of the additional exports to other markets. *See Nippon Steel*, 494 F.3d at 1379; *Cogne*, 29 CIT at 1173; *Usinor*, 27 CIT at 1403.

tally unrelated to the subject imports";[5] (2) to rationally explain how declines in the domestic industry's production and shipment levels demonstrate vulnerability, as opposed to highlighting the natural consequences flowing from significant restructuring within the United States ball bearing market;[6] and (3) to link certain economic indicia to the agency's discernible adverse impact conclusion in a rational fashion. *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1325–27. With respect to non-subject imports, the court found that the agency failed to address conflicting record evidence that suggested large volumes of non-subject imports minimized the discernible adverse impact of the subject United Kingdom imports.[7] *Id.* at ___, 637 F. Supp. 2d at 1327. The agency had provided only conclusory statements that such evidence did not affect its determination.[8] *Id.* (citing

[5] In its characterization of the court's analysis of this issue, the Commission implies that the court displaced the agency's reading of the record with its own. *Second Remand Determination* at 15 ("According to the Court, the record *could be read* to show that the reported capacity and production declines were generally due to factors other than the subject imports.") (emphasis added) (citing *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1325–26). To the contrary, a full reading of the subject passage reveals that the court required the Commission to "explain rationally why [the conflicting] evidence is insignificant to its [vulnerability] finding on the next remand," *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1326, a charge consistent with an agency's duty to address conflicting evidence on the record and support its conclusions with substantial evidence. *See Suramerica de Aleaciones Laminadas, C.A.*, 44 F.3d at 985. In any event, the Commission abandons its position and now concedes that "the industry was engaged in significant restructuring during the period of review, that the resulting changes in the industry's capacity levels had a depressing effect on the industry's production, shipment and sales levels, and that these reductions were not due solely or primarily to the effects of the subject import competition." *Second Remand Determination* at 21.

[6] The court also asked the Commission to explain why it focused solely on the years falling under the most recent sunset review, given that the antidumping order has covered the subject merchandise since 1989. *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1326. On remand, the agency reasonably explained that the period from 2000 to 2005 contained "the most probative data on the current state of the industry" and that "the industry's restructuring efforts had been primarily effectuated during the second period of review." *Second Remand Determination* at 25 & n.92 (citations omitted).

[7] The court also found that the Commission detrimentally relied on deficient conclusions from other portions of the first remand determination in its non-subject imports analysis for purposes of the cumulation inquiry. *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1319–24, 1327 (citing *Certain Ball Bearings and Parts Ther[e]of from Japan and the United Kingdom*, USITC Pub. 4082, Inv. Nos. 731–TA–394–A, 731–TA–399–A, at 25, 37–41 (May 2009)).

[8] The court suggested that, as part of its analysis, the Commission might choose to explain "how the subject imports from the United Kingdom are well suited to begin pricing their products more aggressively in the market to recover market share once the order is revoked." *NSK III*, 33 CIT at ___, 637 F. Supp. 2d at 1327. The agency has taken this statement to embody the court's principal remand instruction from *NSK III*.

Certain Ball Bearings and Parts Ther[e]of from Japan and the United Kingdom, USITC Pub. 4082, Inv. Nos. 731–TA–394–A, 731–TA–399–A, at 25 (May 2009)).

On remand, the Commission confirmed the vulnerability of the domestic ball bearing industry and concluded that the subject ball bearings from the United Kingdom likely will have a discernible adverse impact in the absence of the order. *Second Remand Determination* at 21–54. Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. (together, "NSK") attack several components of the Commission's determination.[9] NSK avers that the subject United Kingdom producers have no incentive to ship additional amounts of the subject merchandise to the United States in the absence of the order. NSK Comments 4–14. NSK bases its assertion on the United Kingdom industry's capacity and production capabilities and focus on markets other than the United States, as well as the lack of a meaningful trend in certain price comparison data. NSK Comments 4–14. Finally, NSK discounts the Commission's vulnerability finding and asserts the record shows that (1) the three largest United States producers and (2) the remaining members of the domestic industry likely will not suffer an adverse impact by unrestrained subject imports.[10] NSK Comments 14–25. Defendant-Intervenor The Timken Company ("Timken") agrees with the Commission's cumulation analysis, reasoning that the agency supported its vulnerability and discernible adverse impact analyses with substantial evidence. Timken Comments 8–19, 34–42. On vulnerability, Timken shadows the agency's analysis and offers additional evidence on reductions in the industry's production capacity to purportedly prove the weakened condition of the United States ball bearing industry.[11] Timken Comments 8–19. Timken similarly echoes the Commission's analysis on discernible adverse impact. Timken Comments 34–42.

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[9] While Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") focus their comments exclusively on the separate issue of causation and the role of non-subject imports in that inquiry, JTEKT Comments 5–28, the companies take no position on the Commission's reassessment of the vulnerability and discernible adverse impact findings. JTEKT Comments 5 n.2.

[10] Defendant-Intervenor The Timken Company ("Timken") objects to NSK's assertion that "evidence of the motives and intentions of individual producers" can negate an affirmative vulnerability finding. Timken Comments 9 n.11. The court agrees for reasons explained in this opinion.

[11] Curiously, Timken reaches for other record evidence to support the Commission's vulnerability finding after reminding the court in the preceding pages that "[s]o long as there is [an] adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade . . . must defer to the Commission." Timken Comments 13 (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006)). The Commission presumably accounted for this data in its analysis.

1. The Vulnerability of the Domestic Ball Bearing Industry

On remand, the Commission determined that, although the domestic industry significantly reduced its capacity levels during the period of review for reasons not primarily related to the subject United Kingdom imports, *Second Remand Determination* at 26–28, the United States ball bearings industry currently remains in a "weakened state" and, therefore, in a vulnerable condition at the end of the period of review. *Id.* at 29. As a result, the agency found the United States industry susceptible "both to the likely discernible adverse impact of the subject U.K. imports upon revocation of the U.K. order and to the likely material impact of the cumulated subject imports." *Id.* at 26. The Commission correctly notes that it need not determine that the subject imports caused the vulnerability of the domestic industry. *Id.* at 22–25 (citations omitted). The agency reasonably cites to the following economic indicia to stress that, contrary to NSK's claims that restructuring led to a more productive or efficient domestic industry, the United States industry remained in a weakened state during the period of review: (1) a 12.9% drop from 2000 to 2005 in the industry's capacity utilization rate; (2) a 22% decline in the industry's productivity, measured in terms of bearings produced per hour; (3) a deteriorated cost structure, including an increase in the ratio of the cost of goods sold relative to net sales revenues; and (4) dwindling profit levels, which consisted of across-the-board decreases in operating income levels and income margins, gross profits, and gross profit margins. *Id.* at 30–33. The Commission also points to declines in net sales revenue and market share during the period of review as substantial evidence of a vulnerable domestic industry.[12] *Id.* at 35–36. In view of this evidence and the agency's conclusion on this issue, the Commission has provided the rational connection missing from its previous determinations, and the court sustains the agency's vulnerability finding.[13]

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[12] Importantly, the Commission rationally explains that, while the overall sales revenues increased from 1985 to 2005, "the growth in the industry's sales revenues since the original period of investigation failed to keep up with the growth in apparent U.S. consumption in the market between 1985 and 2005, indicating that the industry has been unable to improve its sales revenues to track the growth in demand." *Second Remand Determination* at 35–36 (footnotes omitted).

[13] The Commission also addresses two other relevant arguments from NSK on this issue. First, despite NSK's request, the agency reasonably explains that it will not consider fluctuations in certain economic indicators at the end of the period of review as proof of a robust domestic industry, since "the small increases in these indicia simply did not come close to offsetting the double-digit declines in these indicia for the entire [period of review]." *Second Remand Determination* at 37. Second, the Commission correctly declined NSK's request to exclude the financial results of three domestic producers from its vulnerability analysis, *id.* at 37–38, for the agency must evaluate the entire industry, which includes

2. The Likely Discernible Adverse Impact of United Kingdom Ball Bearings

The Commission concluded that the subject United Kingdom imports likely would increase "to a level that would have a discernibly adverse impact" based on the subject producers' level of available capacity, high degree of export orientation, and continued presence in and the price attractiveness of the United States market. *Second Remand Determination* at 47. While the court appreciates the "relatively low threshold" the imports must cross to create a discernible adverse impact, *Nippon Steel*, 494 F.3d at 1379 n.6 (citation omitted), the court still must ensure that the agency supports its determination with substantial evidence, which includes the requisite rational connection between the facts on the record and the conclusions drawn.[14] *Matsushita Elec. Indus. Co.*, 750 F.2d at 933. The agency fails to do so in the *Second Remand Determination*.

The agency's first problem stems from its reliance on the court's review of the Commission's assessment of certain price data under the "likely volume" and "likely price effects" components of the material injury analysis to support its affirmative discernible adverse impact conclusion. *Second Remand Determination* at 47 nn.177–78, 48 n.180, 49 nn.181 & 183, 53 n.201 (citing *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1342–47). However, this Court has found that the discernible adverse impact and material injury analyses "are discrete inquiries" and that the agency may not rely on conclusions from one analysis to prove another. *Weiland-Werke AG*, 31 CIT at 1895, 525 F. Supp. 2d at 1365. Nor does the court's review of a separate issue with similar factors obviate the agency's duty to support its conclusions on separate claims with substantial evidence. *Matsushita Elec. Indus. Co.*, 750 F.2d at 933. Therefore, the Commission must separately discuss the pricing data in the context of a cumulation analysis on remand.

The Commission also relies on inadequate evidence in support of its analysis. First, the Commission notes that while the subject producers operate near maximum capacity, the United Kingdom producers' available capacity constitutes "more than ten-fold" the number of

"producers as a whole of a domestic like product." 19 U.S.C. § 1677(4)(A); *see also Nevinnomysskiy Azot v. United States*, 32 CIT ___, ___, 565 F. Supp. 2d 1357, 1373 (2008) ("[T]he Commission must evaluate the entire industry and include all of the participating producers.") (citation omitted).

[14] This rational connection is especially important considering the facts of this case and the minuscule amount of subject United Kingdom imports present in the United States market, both in terms of market share measured by value and the quantity sold relative to the domestic market supply.

subject bearings they shipped to the United States in 2005. *Second Remand Determination* at 45. The agency implicitly assumes that the subject United Kingdom producers would ship all excess capacity to the United States in the absence of the order, but it does not provide evidence for its assumption. *Second Remand Determination* at 45 & n.171. The agency might have based its assumption on the price attractiveness of the domestic market, but that would have been in error if, as seems to be the case, the Commission relied on conclusions reached in the court's review of a different issue, as explained in the previous paragraph. If, on the other hand, the Commission used the subject producers' presence in the domestic market and their export orientation as support for its finding, that reliance also fails for the reasons explained below. Either way, the Commission failed to provide substantial evidence to support its conclusion.

The Commission fails to explain rationally how United Kingdom ball bearings would compete with domestic ball bearings and non-subject imports in the absence of the order and, thus, likely reach the requisite level of impact.[15] First, the agency reasonably notes the fungibility between the domestic, United Kingdom, and non-subject ball bearings. *Id.* at 43. Second, as additional proof that the United Kingdom imports would compete aggressively on price, the Commission claims that those imports "have maintained a consistent and stable presence in the market during the first and second period of review, shipping between $8.2 million and $17.2 million worth of bearings to the United States during both periods." *Id.* (citing *See Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom: Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396, and 399–A (Second Review)*, USITC Pub. 3876 (Aug. 2006) ("*Staff Report* ") at Table BB-I-1). The court questions the reasonableness of the Commission's statement, especially given that the agency fails to account for the dramatic

[15] The Commission cites to certain price comparison data to show that United Kingdom imports would be able to compete more aggressively on price with the domestic and non-subject imports to obtain market share in the absence of the order. *Second Remand Determination* at 49–52. The agency relies on this data despite the court's explicit statements in *NSK I* that it could "discern no meaningful trend from this information" and that the Commission based its conclusions on "a deficient sample." 32 CIT at ___, 577 F. Supp. 2d at 1347; *see also Second Remand Determination* at 49 n.184 ("As the Court correctly pointed out in *NSK I*, the Commission . . . had price comparison data for the U.K. imports for [only] *one of the ten* price comparison products reviewed in the Commission's report in the sunset review.") (emphasis added) (citation omitted). The court declined to find that the pricing data supplied the requisite rational basis to support the agency's findings in *NSK I*, and the Commission does not convince the court to decide otherwise in its review of the second remand determination.

fluctuation and strong downward trend in the value of the subject United Kingdom ball bearings sold in the United States since the first period of review. *Staff Report* at Table BB-I-1. The significant downward change in the subject imports' market share in terms of value since the first period of review — between 20% and 40% — also undercuts the Commission's rationale that the subject United Kingdom imports maintained a stable presence in the domestic market and, thus, would compete on price with domestic ball bearings and non-subject imports. *Second Remand Determination* at 43 n.162. The Commission also suggests that because the United Kingdom producers sold the subject imports in most end-use sectors and major sales channels of the domestic market, they likely will compete more aggressively on price. *Id.* at 44. The court is not persuaded. Presence alone in numerous channels of the United States market does not prove that, in the absence of the order, the subject goods likely would compete with domestic ball bearings and non-subject imports in the domestic market or that the subject producers likely would use those channels. The same gap in logic plagues the Commission's reliance on the export-oriented character of the United Kingdom industry as additional proof that the subject goods likely would compete on price. Orientation alone does not demonstrate a likelihood of competition, and the Commission's reliance on such evidence, together with its other points, does not raise the agency's justification to the requisite rational connection needed for the court to sustain the finding.

Finally, the Commission does not support with substantial evidence its conclusion that the United Kingdom industry likely would export an additional discernible amount of its products to the United States upon revocation, especially in view of the subject industry's increased focus "on products of 'particular interest' to the European market." *Id.* at 44 n.166, 47 n.178. The agency bases its conclusion on record evidence that purportedly shows that "U.K. imports retain a stable presence in the U.S. market and are sold in most of the end use sectors of the market." *Id.* at 44 n.166 (citing *Staff Report* at Table BB-I-10). The agency does not support with substantial evidence its conclusions on the United Kingdom's market share and presence in the United States market for reasons previously explained, and its reliance on the same evidence does not cure its conclusion on this point. The agency subsequently supplies a laundry-list of other evidence to purportedly justify its conclusion. First, the agency points to similarities in the United Kingdom and domestic industries' sales to the automotive and customs bearings market. *Second Remand Determination* at 44 n.166. That the two industries may sell to similar subsections of their respective markets does not necessarily demon-

strate that United Kingdom producers likely would shift their focus from Europe to the United States. The court cannot discern, without more, the rational connection between the record evidence and the agency's conclusion on this point. Second, the Commission also relies on certain evidence from the three largest producers in the United Kingdom to support its finding: the producer with the greatest amount of excess capacity in 2005 continued to ship the subject merchandise to the United States during the period of review and another had excess capacity that "could" enable it to do so in the future, though the agency agreed that the third company was not likely to "take advantage of revocation" of the order. *Id.* at 47 n.178 (citing *Staff Report* at Table BB-IV-3). The agency again presumes, without a rational basis and relying on impermissible conjecture, that the United Kingdom producers would divert all excess capacity to the United States market, and the Commission's use of the term "could" denotes mere possibility, rather than the requisite probability needed to satisfy the likely standard. The evidence offered by the Commission does not rise above a speculative level and, therefore, does not show that the subject United Kingdom imports (1) are more likely than not to focus on the United States market and (2) likely will have a discernible adverse impact on the domestic industry.

In sum, the court finds that the Commission supports its vulnerability finding with substantial evidence. However, as to the remainder of its cumulation analysis, the Commission does not support with substantial evidence its conclusion that the subject imports from the United Kingdom likely would have a discernible adverse impact in the absence of the antidumping duty order. More specifically, the Commission fails to provide the requisite rational connection which demonstrates some incentive likely would draw a discernible amount of the subject goods specifically to the United States market in the absence of the order. *See Nippon Steel*, 494 F.3d at 1379; *Cogne*, 29 CIT at 1173; *Usinor*, 27 CIT at 1403. The court does not believe that the existing record, taken as a whole, can support an affirmative discernible adverse impact finding. The Commission may reopen the record and obtain additional data on this issue in the next remand proceeding, if it so chooses.

B. Additional Issues: The Likely Impact of Subject Imports on the Domestic Industry & The Causation Inquiry

The Commission completes its redetermination of the likely impact and causation issues under the assumption that it properly cumulated ball bearings from the United Kingdom with other subject imports. *Second Remand Determination* at 64–83. The question of likely impact asks the agency to answer whether the cumulated

subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the antidumping duty orders. The causation inquiry requires the Commission to determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry which will likely continue or recur in the absence of the antidumping duty orders. In completing this task, the facts of this case necessitate that the Commission confirm that subject imports likely will reach the requisite level of causation despite the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market. Non-subject imports have "become a significant and price-competitive factor" in the United States ball bearings market, amply increased their market share in terms of value at the expense of domestic and subject ball bearings, and have undersold the domestic like product and subject imports in at least two-thirds of the possible price comparisons. *Id.* at 69–70. In view of this data, the non-subject imports may prevent the subject imports from achieving the requisite level of causation and, therefore, serve as an impenetrable barrier that precludes the agency from affirmatively finding injury in this sunset review. The Commission should address this information as part of the causation inquiry. However, because the court finds that the agency did not support its cumulation determination with substantial evidence, it cannot address the merits of these remaining issues.

The court appreciates the Commission's continued vigor in resolving these issues and the diligence with which it has addressed these difficult questions thus far. Indeed, assuming that the agency had correctly cumulated the subject imports, the Commission's analysis of the two remaining issues nearly resembles the kind of substantial evidence needed for the court to sustain an agency determination. When it addresses these two issues on remand, the Commission should avoid the use of deficient price comparison data and certain conclusions that the court found unsupported by substantial evidence in the agency's cumulation analysis of the *Second Remand Determination*. *See, e.g., id.* at 72, 74, 77.

IV. Conclusion

For the foregoing reasons, it is

ORDERED that the court **SUSTAINS** in part and **REMANDS** in part the Commission's *Second Remand Determination* for further proceedings consistent with this opinion. Specifically, it is

ORDERED that, with respect to the cumulation analysis, the court **SUSTAINS** the Commission's conclusion that the domestic industry is in a weakened and, therefore, a vulnerable condition. However, the court **REMANDS** the discernible adverse impact analysis to the agency. In the third remand determination, the Commission must demonstrate that some incentive likely would draw a discernible amount of the subject United Kingdom goods specifically to the United States market in the absence of the order. Because the court does not believe the existing record, taken as a whole, can support an affirmative discernible adverse impact finding, the Commission may reopen the record and obtain additional data on the issue; it is further

ORDERED that the Commission must decide whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the antidumping duty orders; it is further

ORDERED that the Commission must determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry that will likely continue or recur in the absence of the antidumping duty orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market; it is further

ORDERED that, in completing its analysis of the causation and likely impact inquires on remand, the Commission must address the court's concerns expressed in *NSK III* over the agency's redetermination of those issues; and it is further

ORDERED that the Commission shall provide a status report to the court within 30 days from the date of this opinion that explains whether the agency will re-open the record on the cumulation issue. The parties shall also file a joint scheduling order consistent with Court and Chambers rules at that time.

Dated: April 12, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–39

AD HOC SHRIMP TRADE ACTION COMMITTEE, VERSAGGI SHRIMP CORPORATION, AND INDIAN RIDGE SHRIMP COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and EASTERN FISH COMPANY, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 05–00192

[Affirming the redetermination by the United States Department of Commerce of the scope of less-than-fair-value determinations in an antidumping proceeding]

Dated: April 14, 2010

Picard Kentz & Rowe LLP (*Nathaniel M. Rickard* and *Andrew W. Kentz*) for plaintiffs Ad Hoc Shrimp Trade Action Committee and Versaggi Shrimp Corporation.

Stewart and Stewart (*Geert M. De Prest, Elizabeth J. Drake*, and *Terence P. Stewart*) and *Leake & Andersson, LLP* (*Edward T. Hayes*) for plaintiff Indian Ridge Shrimp Company.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Kelley Drye & Warren LLP (*Michael J. Coursey* and *Mary T. Staley*) for defendant-intervenor.

OPINION

Stanceu, Judge:

I. Introduction

This matter arose from plaintiffs' contesting six amended final "less-than-fair-value" ("LTFV") determinations that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued on imports of certain frozen warmwater shrimp (the "subject merchandise"). In *Ad Hoc Shrimp Trade Action Committee v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1166, 1182 (2009) ("*Ad Hoc III* "), the court ordered Commerce to redetermine the scope of its amended final LTFV determinations with respect to dusted shrimp, a product consisting of flour-coated frozen shrimp that the Department had excluded. The court held that Commerce did not state reasoning adequate to support the dusted shrimp exclusion and that, as a result, the LTFV determinations were contrary to law. *Id.* at __, 637 F. Supp. 2d at 1181. "Commerce failed to consider, and failed to resolve, the question of whether dusted shrimp is within the proposed scope of the antidumping investigation or investigations sought by the Petitions." *Id.*

In the redetermination issued by Commerce pursuant to the court's remand order, Commerce concluded that it had erred in excluding dusted shrimp from the scope of the LTFV determinations and drafted amended scope language to include the product. Final Results of Redetermination pursuant to Ct. Remand 18, App. 1 ("Redetermination"). Plaintiffs Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), Versaggi Shrimp Corporation ("Versaggi"), and Indian Ridge Shrimp Company ("Indian Ridge") (collectively "plaintiffs" or "petitioners") urge the court to affirm the Redetermination. Pls.' Comments Regarding Final Results of Redetermination pursuant to Ct. Remand 1 ("AHSTAC & Versaggi Comments"); Comments of Indian Ridge Shrimp Co. Regarding the Remand Results 2 ("Indian Ridge Comments"). Defendant-intervenor Eastern Fish Company, Inc. ("Eastern Fish") urges the court to reject the Redetermination as contrary to law. Def.-Intervenor's Comments Regarding Final Results of Redetermination pursuant to Ct. Remand 15–16 ("Def.-Intervenor Comments"). The arguments of Eastern Fish fail to persuade the court. Because Commerce complied with the remand order in *Ad Hoc III* and lawfully redetermined the scope of the investigations, the court will affirm the Redetermination through the entry of judgment.

II. Background

The background of this case is presented in the court's opinions in *Ad Hoc Shrimp Trade Action Committee v. United States*, 31 CIT 102, 103–09, 473 F. Supp. 2d 1336, 1337–42 (2007) ("*Ad Hoc I* "), and *Ad Hoc III*, 33 CIT at __, 637 F. Supp. 2d at 1168–74, which the court recounts in part below and supplements as necessary to include developments occurring since *Ad Hoc III* was decided on July 1, 2009.

Plaintiffs brought multiple actions, later consolidated, to contest six amended final affirmative LTFV antidumping determinations that Commerce issued in 2005 on certain imported frozen warmwater shrimp from each of the following countries: Brazil, Ecuador, India, the People's Republic of China, the Socialist Republic of Vietnam, and Thailand.[1] *See, e.g., Notice of Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (Feb. 1, 2005). Each of the final and amended final LTFV determinations excluded dusted shrimp from the scope of the investigation, and Commerce accordingly excluded dusted shrimp from the scope of each of the six

[1] The administrative record provided in this case, Consolidated Court No. 05–00192, sets forth the documents for the Thailand investigation. Accordingly, the court cites to the Federal Register notice for Thailand. The court also provides the citations for parallel determinations made in the concurrent investigations of Brazil, Ecuador, India, the People's Republic of China, and the Socialist Republic of Vietnam.

antidumping duty orders. *Id.* at 5147.[2]

In this litigation, plaintiffs, who were petitioners in the underlying antidumping proceedings, sought as relief a remand directing Commerce to amend the antidumping duty orders to include dusted shrimp. *Ad Hoc I*, 31 CIT at 112–14, 473 F. Supp. 2d. at 1345–46. The Court of International Trade dismissed the consolidated action, concluding that the requested relief was unavailable because the final affirmative injury determination of the U.S. International Trade Commission ("ITC" or the "Commission"), which plaintiffs did not contest, had not included dusted shrimp. *Id.* at 112–14, 116, 473 F. Supp. 2d. at 1345–46, 1348. The Court of Appeals for the Federal Circuit ("Court of Appeals"), affirming in part and reversing in part, held that the Court of International Trade, although correctly concluding that the requested relief of a remand to amend the antidumping duty orders was unavailable because of the absence of a final Commission injury determination on dusted shrimp, erred in dismissing the case. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1375 (Fed. Cir. 2008) ("*Ad Hoc II* "). The Court of Appeals concluded that plaintiffs had sought, in addition to amendment of the antidumping duty orders, a declaratory judgment that Commerce acted unlawfully in excluding dusted shrimp from the scope of the antidumping investigations. *Id.* at 1381–82. The Court of Appeals held that the lack of judicial authority to order a review of the Commission's injury determination did not preclude adjudication on the merits of plaintiffs' claim contesting Commerce's final amended LTFV determinations. *Id.* at 1382–83. The Court of Appeals vacated the dismissal and remanded the action, directing the Court of International Trade to "address the merits of AHSTAC's claim that 'dusted shrimp' should [not] be excluded from the scope of Commerce's final determination." *Id.* at 1385.

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[2] Commerce published, on the same day, five amended final less-than-fair-value determinations and antidumping duty orders for the five other exporting countries. *See Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil*, 70 Fed. Reg. 5143, 5145 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador*, 70 Fed. Reg. 5156, 5158 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5147, 5148 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149, 5152 (Feb. 1, 2005); *Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 70 Fed. Reg. 5152, 5156 (Feb. 1, 2005).

In *Ad Hoc III*, the Court of International Trade concluded "that the Department's decisions to exclude dusted shrimp from the scope of the final LTFV determinations were contrary to law because they were unsupported by any valid reason." *Ad Hoc III*, 33 CIT at __, 637 F. Supp. 2d at 1181. The court explained that

> Commerce failed to consider, and failed to resolve, the question of whether dusted shrimp is within the proposed scope of the antidumping investigation or investigations sought by the Petitions. Although Commerce has discretion to make exclusions from the scope, even when doing so appears to be contrary to the proposed scope as set forth in a petition, it must exercise this authority reasonably. The three reasons set forth in the Scope Clarification Memorandum in support of the exclusion, for the reasons discussed in this Opinion and Order, do not suffice.

Id. The court ordered the Department to reconsider and redetermine the scope of the final and amended final LTFV determinations with respect to the issue of the inclusion of dusted shrimp. *Id.* at 1182.

After obtaining comments on a draft remand redetermination, Commerce prepared a final version, which it filed on October 29, 2009, and also filed an accompanying administrative record on November 19, 2009. AHSTAC, Versaggi, and Indian Ridge filed comments with the court on November 30, 2009 urging the court to affirm the Redetermination. AHSTAC & Versaggi Comments 1; Indian Ridge Comments 2. Eastern Fish filed comments with the court on December 15, 2009, arguing that the Redetermination must be set aside as contrary to law and seeking an additional remand. Def.-Intervenor Comments 15–16.

III. Discussion

In the Redetermination, Commerce determined that its earlier exclusion of dusted shrimp from the scope of the LTFV determinations was in error. Redetermination 18. After considering the proposed scope language in the petitions filed by the domestic industry to initiate the LTFV investigations ("Petitions"), which included food preparations, Commerce determined that "dusted shrimp constitutes a food preparation within the meaning of the scope of the original investigations." *Id.* at 16. Commerce concluded that it "employed the correct analytical framework in its draft remand redetermination in determining that dusted shrimp would be considered food preparations (which are included in the plain language of the scope), and that dusted shrimp would not fall under the breaded shrimp exclusion

listed in the scope language." *Id.* at 13. Commerce concluded that dusted shrimp should be added to the scope as set forth in the LTFV determinations and included "Final Scope Language on Remand" to be used for this purpose. *Id.* at 18, App. 1.

In the Redetermination, Commerce also "analyzed the impact of finding dusted shrimp to be within the scope on our antidumping duty calculations." *Id.* at 18. Commerce concluded that no change in the calculations for any of the six LTFV determinations would be needed. *Id.* "Out of all investigations, only one respondent, the Allied Pacific Group in the investigation covering the People's Republic of China, reported sales of dusted shrimp during the period of the investigation, and these sales comprised a very small percentage of its total sales." *Id.* Commerce also found that it inadvertently had included the dusted shrimp sales of Allied Pacific Group in the margin calculation for that respondent and that, as a result, "it is unnecessary to recalculate any antidumping duty margins in this remand determination." *Id.*

The Redetermination addresses the objections that Eastern Fish and Long John Silver's, Inc. ("LJS") made in comments on the draft remand redetermination and rejects all but one of these objections. *Id.* at 8 n.10, 13–17. Commerce acknowledged that its "references to amending the scope of the [antidumping duty] orders in its Draft Remand Redetermination were in error" and agreed with Eastern Fish and LJS that "the [Court of International Trade] instructed the Department to address in its redetermination only the issue of whether the scope of the final and amended final determinations should include dusted shrimp, and not the scope of the orders." *Id.* at 13. Commerce therefore decided that dusted shrimp should be added to the scope language of the LTFV determinations but not to the scope of the antidumping duty orders. *Id.*

Based on its review of the Redetermination and the record Commerce has filed, the court concludes that the Redetermination complies with the court's order in *Ad Hoc III* and sets forth reasoning that is adequate to support the Department's findings and conclusions. The Redetermination determines that dusted shrimp is included within the plain meaning of the proposed scope language as set forth in the original petitions and, specifically, is described by the term "food preparations" as used therein. *Id.* at 7. The Redetermination further determines, logically and consistently with the record evidence in this case, that dusted shrimp does not fall within the breaded shrimp exclusion. *Id.* at 8 ("Dusted shrimp is an input into the production of breaded and battered shrimp, rather than breaded

or battered shrimp itself. Shrimp coated with flour is physically different from shrimp coated with breading or batter.").

In its comments to the court, defendant-intervenor Eastern Fish argues that Commerce, having determined that dusted shrimp is within the scope of the investigations, "was required on remand to again determine whether dusted shrimp is within a class or kind of merchandise separate from the class that covers all other subject merchandise, but failed to do so without providing any lawful reason." Def.-Intervenor Comments 15. Eastern Fish seeks a second remand order to "direct the agency to determine whether dusted shrimp constitutes a separate class or kind of merchandise from the class that covers all other subject merchandise in these investigations, and if so, to take the appropriate administrative actions that are required by this result." *Id.* at 15–16. It argues that Commerce "for each petition . . . must determine (1) the number of classes or kinds of merchandise covered by that petition's suggested scope language, and (2) the boundary for each such class." *Id.* at 5. Defendant-intervenor points to a practice by Commerce of determining whether the scope of imported merchandise set forth in a petition encompasses more than one class or kind of merchandise by applying the five criteria set forth in *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983). Def.-Intervenor Comments 7.

Defendant-intervenor identifies what it considers to be indications that the scope of the investigations includes more than one class or kind of merchandise. *Id.* at 9–11. It submits that during the investigations petitioners not only argued that all proposed subject merchandise constituted a single domestic like product despite widely varying degrees of post-harvest processing, but also argued that breaded shrimp, for which petitioners wanted an exclusion, was not part of that domestic like product. *Id.* at 10–11. According to Eastern Fish, Commerce's accepting petitioners' position on a breaded shrimp exclusion strongly suggests that breaded shrimp is within a separate class or kind of merchandise from other subject merchandise. *Id.* at 11.

With specific respect to dusted shrimp, Eastern Fish recounts that Commerce, applying a *Diversified Products* analysis, excluded dusted shrimp from the investigations "largely on its finding that dusted shrimp constituted a separate class or kind of merchandise from all covered merchandise." *Id.* at 13. Eastern Fish submits that it was improper for Commerce, on remand, to place dusted shrimp within the scope of the investigations yet also conclude that it was not required to perform a class-or-kind analysis with respect to dusted shrimp. *Id.* at 4.

Eastern Fish's argument does not persuade the court that the Redetermination is contrary to law. The premise of the argument—that Commerce improperly has avoided making a determination on whether or not dusted shrimp is a separate class or kind of subject merchandise—misconstrues the Redetermination and is contrary to the record and procedural history of this case. Implicit in the Redetermination is a decision by the Department that dusted shrimp is included within the same class or kind of merchandise as all other subject shrimp.

Commerce issued the Redetermination in response to the order in *Ad Hoc III*, which found fault with the Department's determination that dusted shrimp was a separate class or kind of merchandise from the subject merchandise. *Ad Hoc III*, 33 CIT at __, 637 F. Supp. 2d at 1179. The court observed that the general scope language was not limited to frozen shrimp that lacked any form of a coating, seasoning, marinade, or sauce and that it appeared to include all forms of processed frozen warmwater shrimp, as defined in the general scope language, that were not specifically excluded. *Id.* The court also noted that the general scope language also encompassed food preparations, other than prepared meals, that contained more than twenty percent by weight of warmwater shrimp. *Id.*

Eastern Fish's objection relies in part on the following sentence in the Redetermination: "Given that the Department now finds dusted shrimp to be covered by the plain language of the scope and is thus subject merchandise, we are no longer examining whether it is a separate class or kind of merchandise for purposes of determining whether it should be covered or excluded." Retermination 17. Defendant-intervenor construes this sentence, and related discussion in the Redetermination, as signifying that Commerce has decided that it need not consider whether dusted shrimp constitutes a separate class or kind of merchandise. Def.-Intervenor Comments 3–4.

Defendant-intervenor's argument rests on a selective reading of the Department's discussion of the "class or kind" issue. Considered as a whole, the analysis in the Redetermination is not consistent with a determination that dusted shrimp is a separate class or kind of merchandise. In the investigations, Commerce regarded all imported merchandise within the scope of the investigations to comprise a single class or kind of merchandise, and nothing in the Redetermination modifies that approach. To the contrary, Commerce explicitly stated in the Redetermination its conclusion that dusted shrimp is "covered by the plain language of the scope and is thus subject merchandise." Redetermination 17. Moreover, Commerce expressly rejected Eastern Fish's comment, made in response to the draft re-

mand redetermination, that "because dusted shrimp constitutes a separate class or kind of merchandise from all other subject merchandise, the Department must ensure that all of the initiation requirements have been met for dusted shrimp for each country, and must conduct an LTFV investigation for dusted shrimp from each country." *Id.* at 12. In disagreeing with the comment, Commerce explained that because of its conclusion that dusted shrimp "constitutes a food preparation within the meaning of the scope of the original investigations, we do not need to conduct new investigations for dusted shrimp." *Id.* at 16. Commerce expressly disclaimed the earlier *Diversified Products* analysis under which it characterized dusted shrimp as a separate class or kind of subject merchandise. *Id.* at 17 ("We no longer employ the irrelevant analysis that the Court rejected."). When read in its entirety and in the context of the record and procedural history, the Redetermination does not support defendant-intervenor's objection that Commerce improperly disregarded the question of whether dusted shrimp constitutes a separate class or kind of merchandise. Because the court rejects defendant-intervenor's interpretation of Commerce's decision as stated in the Redetermination, it also must reject the request for a second remand.

IV. Conclusion

The Redetermination is in accordance with law and complies with the court's order in *Ad Hoc III*. The court will affirm the Redetermination by entering judgment accordingly.

Dated: April 14, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE